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**HARVARD LAW SCHOOL
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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF
MISSISSIPPI

OCTOBER TERM, 1910, AND MARCH TERM, 1911

VOL. 99

REPORTED BY
ROBERT POWELL

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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

OCTOBER TERM, 1910.

(Continued from Vol. 98.)

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. STATE ON
RELATION OF ATTORNEY-GENERAL.

[54 South. 446.]

1. TELEGRAPHS AND TELEPHONES. *Regulations. Charges. Statutory law.*
Common carrier. Code 1906, sections 4826, 4899, 4842, 4843, 4844,
4839, 4841, 4845, 4883. Law's 1908, chapter 119, p. 124.

By Code 1906, §§ 4826, 4899, a railroad commission is created for the supervision of common carriers, defining its purpose, and providing remedies for its violation, of which section 4843 includes telegraph and telephone companies as common carriers, as declared by Constitution 1890, § 195. Section 4842 gives the commission power to fix and supervise rates, section 4839 prohibits discrimination in rates, unless authorized by the commission, section 4844 forbids rebates or reductions from fixed charges, and sections 4839, 4841, 4845 and 4883, provide remedies for violations of the act. Annotated Code 1892, sections 4437, 4442, relating to combinations

in restraint of trade and agreements fixing the transportation of commodities, was extended in 1900 (Laws 1900, ch. 88), section 2 of which became Code 1906, § 5002, and was re-enacted by Laws of 1908, chapter 119. Section 1, sub-section K as amended by sub-section N and O defines trusts and combines, and provides procedure and remedies for violations of the act. The defendant company was charged, in a bill filed on relation of the attorney-general, with being a trust, with discriminations in its rates, and with attempting to monopolize the business of independent companies; the prayer of the bill being for an injunction and ouster, and for penalties. *Held* that the specific statutes relating to railroad commission conferred jurisdiction upon it as to the whole matter of regulating telephone rates and provided ample remedies for violation of law to the exclusion of the general anti trust laws.

2. STATUTES. *Implied repeal.*

Laws are presumed to be passed with deliberation and with full knowledge of all existing laws on the same subject, and it is but reasonable to conclude that in passing a statute, it was not intended to interfere with or abrogate any former law relating to the same matter, unless this latter act is either repugnant to the earlier one, or fully embraces the subject-matter thereof, or unless the reason of the earlier law is beyond peradventure removed.

3. TELEGRAPHS AND TELEPHONES. *Statutes. Construction. Remedies.*

Code 1906, § 4885, in the chapter on supervision of common carriers, originally enacted in 1884, before the enactment of the anti-trust laws, provides that the remedies given by this chapter shall be cumulative to those existing by law. *Held*, that in view of Code 1906, §§ 4841, 4883, relating to procedure against common carriers, and the penalties for violation of the anti-trust law provided by Code 1906, § 5004, the section permits no election of remedies for injuries due to a discrimination in telephone rates, but the remedy is limited to that provided by the act for the supervision of common carriers.

4. TELEGRAPHS AND TELEPHONES. *Charges. Statutory provisions. Remedy for discriminating charges.*

Code 1906, § 5007, being part of chapter 145, relating to trusts and combines, and providing that, in a suit by any person injured by a trust or combine, proof that such person has been compelled to pay more for services rendered by a public service corporation by reason of such combine than he would have been compelled to pay but for such agreement or combine, shall be conclusive evidence of

damage and of unlawful purpose, does not indicate an intention of the legislature that the anti-trust laws should apply to discriminations in rates made by a telephone company, defined to be a "common carrier" by the laws for the supervision of common carriers.

APPEAL from the chancery court of Quitman county.

HON. J. Q. ROBBINS, Chancellor.

Bill by state of Mississippi on the relation of the attorney-general against the Cumberland Telegraph & Telephone Company, to enjoin it from doing business in alleged violation of the anti-trust law and to recover penalties. Demurrer overruled and defendant appeals.

The facts are fully stated in the opinion of the court.

Harris & Potter, for appellants, filed an elaborate brief contending that this case is one which falls exclusively under the jurisdiction of the railroad commission. That there is no phase of it which is not provided for and protected by the Railroad Commission Act; that it was created for the purpose of preventing such discrimination as this, if discrimination, in fact, exists and is unlawful, and that it is not a matter embraced in, or intended to be embraced in the Anti-Trust Act. Citing: *Lewis' Sutherland Stat. Con.*, vol. 2, § 363; *Eskridge v. McGruder*, 45 Miss. 294; *Barnes v. Greer*, 65 Miss. 710; *Wood v. Mitchell*, 47 Miss. 231; *Witherspoon v. Lewis*, 47 Miss. 570; *Logan v. State*, 53 Miss. 431; *Board of Education v. Railroad Co.*, 72 Miss. 236; *Lemonius v. Mayer*, 71 Miss. 514; *Lewis' Sutherland*, vol. 2, §§ 369, 370, and 471; *Railroad Co. v. State*, 46 Miss. 157; *Kimball v. Alcorn*, 45 Miss. 145; *Lewis' Sutherland Stat. Con.*, vol. 2, § 499, p. 931; 26 Am. and Eng. Ency. Law, 645 (f) N. S., 36 Am. and Eng. Ency. Law, p. 731 (2) N. S., *Lewis' Sutherland Stat. Con.*, § 581, p. 1072, and § 390; *Peeler v. Peeler*, 68 Miss. 141; 26 Am. and Eng. Ency. Law, 505; *Green v. Weller*, 32 Miss. 650; *Searles v. R. R. Company*, 85 Miss. 560; *Lewis' Sutherland Stat. Cons.*, pp. 965-966.

S. S. Hudson, attorney-general, for appellee.

The state legislatures have powers to deal with the subject-matter and prevent unlawful combinations to prevent competition and in restraint of trade and prohibit and punish monopolies—this is no longer an open question. The above is the language of Mr. Justice Day in 212 U. S. 105, 177 U. S. 28; 20th Supreme Court Rep. 518; 194th U. S. 445.

The legislature of the state of Mississippi has passed such law.

That law is held constitutional.

The railroad commission law is not in conflict with nor antagonistic to the anti-trust laws.

Equity has jurisdiction as determined by supreme court in *Hall v. LaFayette County*, 70 Miss., also 72 Miss. 76-77, and authorities there cited, and the L. & N. R. R. case.

The constitutionality is determined by the *Retail Lumbers Dealers' Association*, 48 So. 1026; Judge Lurton's opinion, in May, 1910; *Waters-Pierce case*, 212 U. S. 86. *The Hammond Packing Co. case*, 212 U. S. 322, and numerous authorities cited in these cases.

As to due process of law, see 2 L. R. A. 655.

Excessive fines, 27 U. S. Sup. Ct. Rep. 305.

Equal protection of the laws, 197 U. S. 115; 25 U. S. Sup. Ct. Rep. 379-289.

We submit that the facts show a flagrant disregard of the law; that the court exercised great indulgence in rendering his decree and the cause should be affirmed.

Sharp & McIntyre, for appellee, filed a brief fully covering case and contending that the Cumberland Telephone Company cannot discriminate against certain persons and localities and utterly disregard the provisions of chapter 145, Code of Mississippi, 1906, and the amendments thereto. Citing: *Chesapeake & P. Tel. Co. v. B. & O. Co.*, 59 Am. Rep. 167; *State ex rel. Baltimore & Ohio Tel. Co. v. Bell Tel. Co.*, 23 Fed. 535; 25 Am. and

Eng. Ency. Law, p. 750; 25 Am. and Eng. Ency. Law, pp. 775-776; *State ex rel. American Union Tel. Co. v. Bell Tel. Co.*, 38 Am. Rep. 583; *State, etc., v. Citizens Tel. Co.*, 55 L. R. A. 139; 14 Am. and Eng. Ency. Law, 1st Ed., p. 163; *Transfer Co. v. Telephone Co.*, 24 Albany Law J. 283; *State v. Telephone Co.*, 23 Fed. Rep. 539; *Nebraska Telephone Co. v. State ex rel.*, 45 L. R. A. 113; *Railroad Commission v. G. & S. I. R. Co.*, 78 Miss. 750; *State, etc., v. Telephone Co.*, 55 L. R. A. 139; *State, etc., v. Telephone Co.*, 38 Am. Rep. 583.

Argued orally by *J. B. Harris* and *W. V. Sullivan*, for appellant, and *S. S. Hudson*, attorney-general, and *W. P. Shenalt*, for appellee.

ANDERSON, J., delivered the opinion of the court.

The state of Mississippi, appellee, on the relation of the attorney-general, filed its bill in the chancery court of Prentiss county against the appellant, the Cumberland Telephone & Telegraph Company, charging it with being a trust, in violation of the anti-trust laws of the state, and seeking to enjoin it from the further prosecution of its alleged unlawful business, and to recover the penalties denounced by the anti-trust statutes for carrying on such business. The appellant demurred to the bill, which demurrer was by the court below overruled, and the appellant granted this appeal to settle the principles of the cause.

The substantial allegations of the bill are: That about fifty per cent. of the telephone business of the state is done by the appellant and the balance by the independent companies. That Booneville and Baldwyn are towns of two thousand and twelve hundred inhabitants, respectively, in each of which appellant has less than six hundred "subscribers." That the established tariff rates for telephone service fixed by the railroad commission for towns in that class are two dollars and seventy-five

cents per month for business houses, one dollar and sixty-five cents per month for residences," and for country service to points not more than one and one-half miles distant from the switchboard two dollars per annum per each phone on line, and two dollars and seventy-five cents per month per line additional." That these rates so fixed "applied to Batesville, Baldwyn, Booneville, Water Valley, Holly Springs, and sixty-four other towns" in the state, and are charged and collected by appellant at all those places, except Baldwyn and Booneville, and possibly two or three others. That at Rienzi, Booneville, and Baldwyn the appellant, for the purpose of driving its competitors from the field, and monopolizing the telephone business in that territory, is, and has been since about 1905, discriminating in its rates against sixty-odd other towns in the state, where the established rate is exacted, in this: That from Rienzi to Corinth, and from Rienzi to Booneville, it has abandoned the regular rate of twenty cents for three minutes service over its toll line, and instead gives the Rienzi Telephone Company free service to Booneville and a ten-cent rate to Corinth. That it has only sixteen patrons at Booneville, all of whom are charged less than the established rate; some paying one dollar per month for residences, some one dollar and fifty cents for business houses, others two dollars, and three are given free service. That on country lines running out more than one and one-half miles from its switchboard at Baldwyn, a flat rate of only two dollars per annum is charged certain of its patrons (naming them), while "at other places the regular tariff rate of two dollars per annum for each phone, and two dollars and seventy-five cents per line per month additional," is charged. That appellant is doing business at a loss at Booneville and Baldwyn; its income at each of those places being largely less than its outlay. That by means of such practices the appellant has monopolized the public telephone business at Rienzi.

and is attempting "to monopolize the prosecution, management, and control of the public telephone business at Booneville . . . to the great injury of the citizens of the state, and to the injury of the independent telephone companies at Booneville and Baldwyn," etc. That this suit is predicated upon chapter 145, Code of 1906, and chapter 119, p. 124, Laws 1908, amendatory thereto.

The prayer of the bill is that appellant be enjoined from further violations of law, "and be ousted from the state of Mississippi," and a decree in favor of the state for a penalty of one thousand dollars per day for each day the law has been violated, aggregating one million and five hundred thousand dollars. The grounds of demurrer raise the question whether there is any equity on the face of the bill.

The gravamen of the bill is that the appellant company, for the purpose of driving out its competitors at Rienzi, Booneville, and Baldwyn, and thereby destroying competition in the telephone business in that territory, is guilty of unlawfully discriminating in rates; such discrimination consisting of the practice of charging less at those points than the regular and lawful tariff of rates, and at Booneville and Baldwyn of charging some of its patrons less than others.

It is contended on behalf of the state that such discrimination constitutes a violation of subsections "k" and "o," § 1, c. 119, pp. 125, 126, Laws of 1908. This act, down to and including subsection "o," is a rescript of section 5002, ch. 145, Code 1906 ("Trusts and Combines"), except by amendment subsections "n" and "o" are added, and the last paragraph of section 5002 extended so as to include individuals, partnerships, and associations of persons. Subsections "k" and "o" and the last paragraph of section 1, prescribing the penalty for their violation, are as follows:

"Any corporation, domestic or foreign, or individual, partnership or association of persons whatever, . . .

(k) who shall monopolize or attempt to monopolize the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business; . . . (o) or who shall destroy or attempt to destroy competition by rendering any service or manipulating, or handling or storing any commodity for a less price in one locality than in another, the differences in the necessary expenses of carrying on the business considered,

“Shall be deemed and held a trust and combine within the meaning and purpose of this act, and chapter 145 of the Code of 1906, and shall be liable to the pains, penalties, fines, forfeitures, judgments and recoveries denounced against trusts and combines in said chapter 145 of the Code of 1906, and shall be proceeded against in manner and form therein provided, as in case of other trusts and combines. And it shall be sufficient to make out a *prima facie* case of a violation of subdivision ‘n’ hereof to show a sale or offer of sale of commodity at a lower price at one place in this state than another, or a violation of subdivision ‘o’ to show a lower charge for the service therein mentioned, in one locality than another.”

On the other hand, it is contended that such discrimination is no violation of the anti-trust laws; that our statutes providing for the supervision of common carriers confer jurisdiction on the railroad commission of the whole matter of the regulation of rates of telephone companies, and provide ample remedies, to both the state and the individual, for injuries done by such companies in making unlawful discriminations in their rates, which are exclusive. In our judgment an understanding of the terms of the respective statutes involved, the mischief sought to be remedied by each, and the remedy provided therefor leads unerringly to the correct solution of the question in this case.

The first act passed for the supervision of common carriers was that of 1884 (Laws 1884, p. 31, ch. 23), which provided alone for the regulation of passenger and freight rates on railroads, and created a commission to supervise such carriers. By section 6 of that act the railroad commission was given authority to fix and supervise tariffs of charges of railroad companies for carrying passengers and freight, and prohibit them from making any rebate or reduction from the rates so fixed, "in favor of any person, locality or corporation, which shall not be made in favor of all other persons, localities or corporations, except as may be allowed by the Commission," and it provided remedies to both the state and individuals for injuries done for its violation. The act of 1884, being revised and amended so as to include telephone, telegraph, sleeping car, and express companies, and in other respects extending and enlarging the powers of the railroad commission, was brought forward into the annotated Code of 1892, being chapter 134 of that Code. And this chapter, being further revised and amended so as to include car service associations, and otherwise extending the authority and jurisdiction of the commission, was brought forward into the Code of 1906, forming chapter 139 of that Code.

By section 195 of the Constitution of 1890, express, telegraph, telephone, and sleeping car companies are declared common carriers and subject to liability as such. By section 4843, Code 1906 (section 4291, Code of 1892) telephone companies are brought under the operation, so far as applicable, of all the statutes on the supervision of carriers, and are required "to comply with the orders and regulations of the commission made in supervising their companies, in like manner, and under like penalties against their companies, their officers and employes, as is provided in case of railroads," and are made liable civilly and criminally in the same manner as railroads. By section 4842, Code 1906 (section 4290, Code 1892),

the railroad commission is given the power to revise and fix rates, and in so doing is to consider the character and nature of the service to be rendered, and the entire business of the carrier and all its earnings, and fix such rates as will allow reasonable compensation for such service. And section 4839, Code 1906 (section 4287, Code 1892), prohibits discriminations in rates against any person, locality or corporation, "unless authorized by the commission." And section 4844 (section 4292, Code 1892) makes unlawful "any rebate or reduction from the tariffs of charges fixed or approved by the commission, in favor of any person, place or corporation, by a change in or deviation from the rates so fixed or approved, unless such change or deviation be first allowed by the commission." And by sections 4839 (section 4287, Code 1892), 4840 (section 4288, Code 1892), 4841 (section 4289, Code 1892), 4845 (section 4293, Code 1892), and 4883 (section 4329, Code 1892), remedies are provided to the state and to individuals for unlawful discriminations in rates, and for other violations of law and orders of the commission. The sections of the Code of 1892, above referred to, are substantially the same as the corresponding sections in the Code of 1906.

The first anti-trust legislation is found in chapter 36, p. 55, Laws 1890, which was revised, amended, and brought forward into chapter 140, Code 1892. In neither the Act of 1890, nor the chapter of the Code of 1892 referred to, is there any provision which, by any construction whatever, could be made to include the case in hand. Those statutes are devoted exclusively to combinations, conspiracies, and agreements in restraint of trade, and affect the production, manufacture, sale, and transportation of "commodities," etc. The first extension of the anti-trust legislation beyond this scope was the act of 1900 (Laws 1900, p. 126, c. 88), section 2 of which contained the identical language of subsection "k," § 1, ch. 119, p. 124, Laws 1908, which also appears in the same

language in the last paragraph of section 5002, Code 1906. At that time there had been in existence for several years a statutory system or policy by which the railroad commission was given jurisdiction of the rates of carriers. "Laws are presumed to be passed with deliberation and with full knowledge of all existing laws on the subject, and it is but reasonable to conclude that in passing a statute it was not intended to interfere with or abrogate any former law relating to the same matter, unless the latter act is either repugnant to the earlier one or fully embraces the subject-matter thereof, or unless the reason of the earlier law is beyond peradventure removed." 26 Am. and Eng. Ency. Law (2 Ed.), 72.

The subject of rates of common carriers is of such vital importance to the public generally, and so intricate, and fraught with so many difficulties, so many varying circumstances and conditions must be considered in determining whether a given rate is just and reasonable, and when and to what extent discriminations in rates ought to be allowed, that the legislature has wisely refrained from dealing with the matter directly, instead providing a complete system of supervision through a commission, giving it jurisdiction of the whole subject, with the power to take testimony and examine into each particular rate and determine its reasonableness. If the rate so established is lowered by the carrier, whether for the purpose of destroying competition, as is alleged against the appellant here, or for any other purpose, the supervision statutes give remedies deemed by the legislature to be ample, which are exclusive of the remedies provided in the anti-trust laws. The supervision laws are specific, they deal with the very subject of rates, and discriminations in rates; while the anti-trust laws are general, and wholly inadequate to remedy the well-known evils flowing from discriminatory and unjust rates.

The only cases brought to our attention which throw any light on this question (and neither of them is directly in point) are *Railroad Company v. Searles*, 85 Miss. 520, 37 South. 939; *United States v. Trans-Mo. Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *State v. Chicago, R. I. & P. Ry. Co.* (Ark.), 128 S. W. 555, and *State v. M., K. & T. R. R. Co.*, 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783. In *Railroad Co. v. Searles*, *supra*, it was held that the fact that car service associations, by Laws 1898, p. 97, were put under the supervision of the railroad commission, indicated a purpose on the part of the legislature that such associations should not be deemed within the anti-trust laws. In *United States v. Trans-Mo. Freight Ass'n*, *supra*, it was held that a contract between competing railroads in reference to traffic rates for articles of interstate commerce, the effect of which was to produce restraint of trade, was not within the terms of the interstate commerce act, but of the Sherman anti-trust law; and in *State v. Chicago, R. I. & P. Ry. Co.*, *supra*, a similar contract between railroads was held not within the terms of the Arkansas anti-trust laws, and for the further reason that the matter of passenger and freight rates had been the subject of separate and independent legislation. And in *State v. M., K. & T. R. R. Co.*, *supra*, it was held that "the existence of a state commission, with power to regulate the rates of railroads and express companies, does not take such companies out of the operation of the statutes (anti-trust laws) forbidding combinations affecting transportation, competition therein, and the cost thereof." There is no charge in this case of a conspiracy or agreement between two or more telephone companies to fix or maintain rates.

Section 4885, Code 1906, provides that the remedies given by this chapter (the chapter on supervision of common carriers) against railroads and other common carriers are cumulative to those now existing by law. It is

contended this provision, which has been in all the statutes on the supervision of carriers from the first act passed in 1884, gives the state and the individual injured the election to proceed either under that chapter or under the anti-trust laws. This position is untenable, so far as injuries growing out of discriminations in rates are concerned. In that respect both laws cannot operate. The enforcement of one will strike the other down. To illustrate: Suppose the railroad commission should so fix the tariffs of rates of two competing railroads as to permit one to charge so much less than the other for exactly the same service as would result in the one unfavored being destroyed. If the state should sue under the anti-trust laws, would it not be a complete defense that the rate charged was legal; that it was the rate fixed by the railroad commission? It appears to us it would. Section 4841, Code 1906, makes discriminations in rates by a carrier a criminal offense, but provides that the carrier "cannot be punished criminally if its tariffs of charges shall have been approved by the commission, and if the charge complained of be not variant from that allowed thereby." Would such a defense be available in a suit under the anti-trust laws for a discrimination in rates, resulting in a monopoly of the business? The anti-trust statute itself provides for no such defense. Take the concrete case: The appellant is sued for monopolizing and attempting to monopolize the telephone business at certain points, by making unlawful discriminations in its rates. Section 4883, Code 1906, provides that in the trial of cases brought against carriers for violating the tariffs of charges as fixed by the commission they may show, in defense, that such tariffs so fixed were unreasonable and unjust (which suits are authorized as well for an undercharge as an overcharge). No such defense would be permissible under the anti-trust laws. The penalty and remedy therefor provided by the respective statutes are radically different. The

penalty for a violation of the anti-trust laws (section 5004, Code 1906) is not less than two hundred dollars nor more than five thousand dollars for each offense, and each day the law is violated is made a separate offense, and the remedy is a suit in the name of the state, on the relation of the attorney-general or district attorney; while the supervision statute (section 4883) provides a fixed penalty of five hundred dollars for each violation of law, to be recovered in a suit by the railroad commission, on the relation of the attorney-general or district attorney. Other examples might be given to show that the legislature intended that the laws for the supervision of common carriers should constitute a complete and independent system within themselves, and that the anti-trust laws were not intended as any part of such system.

Section 5007, Code 1906, provides that, in a suit under that section by any person injured by a trust and combine, proof by such person that he has been compelled "to pay more for any service rendered by any corporation exercising a public franchise, by reason of such unlawful agreement, . . . than he would have been compelled to give . . . but for such act or agreement, shall be conclusive evidence of damage," as well as the unlawful purpose to raise the price of such service. It is argued that this section evidences a purpose on the part of the legislature to apply the anti-trust laws to discriminations in rates, like the case in hand. In the first place, by its express terms it only applies where the person injured is made to pay more (not less) for the service rendered by virtue of the unlawful act or agreement; and in the next place, as we have shown, it cannot, without destroying the effectiveness of the supervision laws, have any application to the subject of discrimination in rates by common carriers, and its terms must, therefore, be limited to that extent.

We would not be understood as holding that the anti-trust laws have no application in any case to those carriers under the supervision of the railroad commission, but that they have no application to those matters alone directly and specifically dealt with by the supervision laws, of which the commission is given jurisdiction. In all other respects the anti-trust laws apply.

Reversed and remanded.

Suggestion of error filed and overruled.

MYRTLE STONE *v.* THREEFOOT BROS. & COMPANY.

[54 South. 595.]

1. JUDGMENT LIEN. *Enrollment. Constructive notice. Bona fide purchaser.*

A *bona fide* purchaser for value without actual notice is entitled to the full protection afforded by the law to such purchaser.

2. SAME.

The enrollment of a judgment against "the City News Company," composed of L. G. W., is not constructive notice to a third person that L. W. is the same person as L. G. W., and property purchased by the third person from the wife of L. W. after she acquired it from him is not subject to the judgment, the purchaser being a *bona fide* purchaser without notice.

APPEAL from the circuit court of Jones county.

HON. R. L. BULLARD, Judge.

In this case, Threefoot Bros. & Co., had execution levied on property claimed by Mrs. Myrtle Stone. From a judgment denying the claim, Mrs. Myrtle Stone appeals.

The facts are fully stated in the opinion of the court.

R. E. Halsell, for appellant.

The execution ought to have been quashed, and the claimant's motion to that effect ought to have been sustained. This enrolled judgment was in favor of Three-foot Brothers & Company against the City News Company, composed of L. G. Weitzel, and has no binding effect on the property of L. Weitzel, and Mrs. Stone, the claimant in this case, is an innocent purchaser of this piano because the judgment against L. G. Weitzel, was no notice to her that the piano, the property originally of L. Weitzel, was bound by the judgment, she was not supposed to go and inquire if L. G. Weitzel and L. Weitzel were one and the same person. This point has been expressly decided by this court in the early part of the term of 1909.

Henry Hilbun, Shannon & Street, and Deavours & Shands, for appellee.

We contend that it was necessary for Weitzel to have executed a conveyance of this property to his wife and had it recorded as mortgages and deeds of trust are recorded. Section 2522 of the Mississippi Code of 1906 provides that "A transfer or conveyance of goods and chattels, or lands, or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged, and filed for record as a mortgage or deed of trust is required to be; and possession of the property shall not be equivalent to filing the writing for record, but, to affect third persons, the writing must be filed for record."

The transfer between Weitzel and his wife, not being in writing, was good as between themselves, but void as to all others. *Gregory et al. v. Dobbs*, 60 Miss., page 549.

ANDERSON, J., delivered the opinion of the court.

The appellees, Threefoot Bros. & Co., recovered a judgment in the court of a justice of the peace against "the City News Company, composed of L. G. Weitzel," on which execution was issued and levied on a piano as the property of the defendant. The appellant, Mrs. Stone, interposed a claim to the piano. There was a trial before the justice of the peace on an agreed state of facts, and a judgment for the claimant, from which appellees appealed to the circuit court, where there was a trial and judgment rendered for appellees, from which the appellant prosecutes this appeal.

The judgment in favor of appellees, on which the execution was issued, was duly enrolled against "the City News Company, composed of L. G. Weitzel." The execution was issued by the circuit clerk against "the City News Company, composed of L. G. Weitzel." The appellant claims to have bought the piano from Mrs. Weitzel; the latter's husband having given the instrument to her after he purchased it. The agreed facts, on which the case was tried in the court of the justice of the peace and in the circuit court, are as follows:

"That L. Weitzel bought the piano in dispute, and gave his notes for the purchase money thereof; the seller reserving title until paid for. It is agreed that Mrs. Catherine Weitzel sold the piano to the claimant, Mrs. B. R. Stone, and executed to Mrs. Stone a bill of sale therefor. Mrs. Stone paid Mrs. Weitzel one hundred and fifteen dollars in cash, and executed four promissory notes to Dr. McCormick for ten dollars each, and one note to the Mississippi Drug Company for twenty dollars, which amount Mrs. Weitzel was due each of the respective parties. That twenty dollars has already been paid Dr. McCormick. That Mrs. Stone has paid all of the purchase money on the piano except forty dollars. Mrs. Stone knew nothing, at the time of the purchase

of the piano, that Threefoot Bros. & Co. had any judgment whatever.

"It is further agreed that L. Weitzel was and is the City News Company, the defendant against which Threefoot Bros. & Co. had a judgment. That the Threefoot Bros. & Co. judgment against the City News Company was enrolled at the time that Mrs. Weitzel sold the piano to Mrs. Stone. Mrs. Weitzel claims that L. Weitzel purchased the piano and gave same to her at the time of the purchase, but before it was paid for. There is no writing on record between Weitzel and wife about the piano. That said piano was all the time in Jones county, and that said judgment was enrolled in said Jones county. That said judgment was valid and legal, but rendered after the purchase of the piano. This statement of facts is to be filed in the papers in the case, and is to be testimony in all courts."

It will be seen from the agreed facts that, at the time the appellant purchased the piano from Mrs. Weitzel, she had no actual knowledge of the judgment against Mrs. Weitzel's husband in favor of appellees, and that she was a *bona fide* purchaser of the piano for value without any notice, unless she was affected with constructive notice from the enrollment of the judgment against the husband of Mrs. Weitzel. The agreed facts further show that the real name of Weitzel was L. Weitzel, and not L. G. Weitzel and that in fact L. Weitzel was "the City News Company," and not L. G. Weitzel; also, at the time of the purchase of the piano by the appellant from Mrs. Weitzel, the judgment in favor of appellees was enrolled.

The question to be decided is whether, at the time of her purchase, the appellant had constructive notice of the judgment in favor of the appellees against Weitzel. There is no question of actual notice involved. The agreed facts show that the appellant was a *bona fide* purchaser for value of the piano without actual notice

of the judgment. She is entitled to the full protection afforded by the law to such a purchaser. The case of *Allen-West Commission Co. v. Millstead*, 92 Miss. 837, 46 South. 256, 131 Am. St. Rep. 556, is decisive of the question involved for the appellant. The enrollment of appellees' judgment against "the City News Company, composed of L. G. Weitzel," was not constructive notice to the appellant that L. Weitzel was the same person as L. G. Weitzel. Had L. Weitzel owned the piano, and appellant purchased from him, she would have gotten a good title against the judgment, because the enrollment of appellees' judgment did not afford constructive notice that it was against L. Weitzel.

Reversed, and judgment here for appellant.

POLE STOCK LUMBER Co. v. OAKDALE LUMBER Co.

[54 South. 596.]

DEED. Parol evidence. Parol warranty.

Where a grantor on delivering to the grantee a quitclaim deed to land, said "that the deed was good and he would stand behind it."

This only tended to prove a warranty by parol, as to which the deed controls.

APPEAL from the circuit court of Lawrence county.

HON. A. E. WEATHERSBY, Judge.

Suit by the Pole Stock Lumber Company against the Oakdale Lumber Company on notes for the purchase money of land. From a judgment for defendant, plaintiff appeals. The facts are fully stated in the opinion of the court.

Hathorn & Hearst, for appellant.

We come now to consider the real defense offered by the defendant to the payment of the notes sued on, under its plea of fraud, and what we conceive to be palpable error on the part of the trial court. The court will bear in mind that the defense offered under this plea was a rescission of the contract on account of the fraud complained of.

In response to this defense we say that, if the defendant ever did have the right to disaffirm this contract and to rescind it and thereby avoid the payment of the notes sued on, it lost and waived that right and cannot now complain of the fraud for several reasons:

First. Defendant waited an unreasonable time after full knowledge of the fraud in offering to rescind.

Second. Defendant condoned the fraud and affirmed the contract after full knowledge of the fraud.

Third. Defendant voluntarily placed itself in a position where restoration of the property and rescission of the contract was absolutely impossible, and this after full knowledge of the fraud.

T. P. Bonner v. John H. Bynum, 72 Miss., page 442; *McCulloch v. Scott*, 56 Am. Dec., page 561, and authorities cited thereunder in footnotes; *Masson v. Bovet*, 43 Am. Dec., page 651 and footnotes; *Davis v. Heard*, 44 Miss., page 50; *Railroad Company v. Neighbors*, 51 Miss. page 412.

G. Wood Magee, for appellee.

Counsel for appellant in their brief say:

“On the trial of this cause on its merits, the defendant offered evidence, under its plea of *non est factum*, to the effect that the notes sued on had been altered in a material respect since they were delivered to the plaintiff. Plaintiff offered evidence to contradict this, which raised a question of fact for the jury, and we concede that this

question was properly referred to the jury; that question raised, therefore, under the plea of *non est factum* is not presented to this court for review."

And if the question raised by the plea of *non est factum* was properly referred to the jury upon a question of fact presented by the evidence, and that question of fact was decided in favor of appellee, then it does seem to me, that no reversal of this case could under any circumstances be had, and therefore it is useless to enter into a discussion of the other features of the case. However, I desire to say that on the question of fraud as raised by the pleadings and by the evidence in the case, I desire to call the court's attention especially to the case of *Myers v. Estell*, 47 Miss., page 4.

In this case will be found a very thorough discussion of the principles involved in the case at bar, and I respectfully submit that the judgment of the circuit court should be affirmed.

SMITH, J., delivered the opinion of the court.

Appellant, plaintiff in the court below, executed and delivered to appellee, the defendant in the court below, a quitclaim deed to timber on certain land; a part of the consideration therefor being two promissory notes. There remaining a balance due on these notes after certain payments had been made thereon, this suit was instituted to collect same. From a judgment in favor of appellee, this appeal is taken.

One of the defenses relied upon by appellee is that it got nothing by its purchase, for the reason that the appellant had no title to the timber, and that it (appellee) was induced to make the purchase by reason of appellant having falsely and fraudulently, with the design to cheat and defraud appellee, represented to it that it had a good and valid title to the timber. The testimony of the secretary of appellee, who acted for it in making this purchase, on this point is as follows: "He (referr-

ing to the agent of appellant, who represented it in making the sale) tendered us a quitclaim deed, and I refused to accept it, and told him that the deed was not good; and he stated that it was the only kind of a deed he would give, and that the deed was good, and says: 'Here are all the old deeds that the company has.' He then turned the deed over to me for the twenty acres, which I didn't get, and then he says: 'These deeds are good, and we will stand behind them.' It was on that representation that we paid him the money. . . . That is about all he said about it. He said: 'These are the deeds the Pole Stock Lumber Company got, and we stand behind them.' And then he said, 'You know the Pole Stock Lumber Company,' and I did know them to be a good firm. I knew one of the parties interested personally at that time."

This evidence is wholly insufficient to support the plea, and at most tends only to prove, by parol, a warranty of title, as to which the written instrument must, of course, control. The court, therefore, erred in submitting this issue to the jury.

Reversed and remanded.

DORCAS KING v. STATE.

[54 South. 657.]

CRIMINAL LAW. *Plea of autrefois acquit. Intoxicating liquors. Code 1906, section 1702.*

The state must either demur or reply in writing to a plea of *autrefois acquit*.

Code 1906 provides: "On the trial of all prosecutions for the violation of law by the sale or giving away of liquors, etc., the state shall not be confined to the proof of a single violation, but may give in evidence any one or more offenses of the same character committed anterior to the day laid in the indictment or affidavit, and not barred by the statute of limitations, but in such case, after conviction or acquittal on the merits, the accused shall not again be liable to prosecution for any offense of the same character committed anterior to the day laid in the indictment or affidavit." Under this statute the state may not prove more than one sale, and then elect which sale it will ask a conviction on. The election must be made before the testimony is introduced. The state takes the benefit of this statute subject to its burdens.

APPEAL from the circuit court of Lauderdale county.
HON. J. L. BUCKLEY, Judge.

Dorcas King was convicted of unlawful retailing and appeals.

The facts are fully stated in the opinion of the court.

Wyatt Easterling, for appellant.

Appellant should have been permitted to present her special plea of *autrefois acquit* to the jury at the beginning of the trial when the issues in the case were being presented to the jury. American and English Encyclopedia of Pleading and Practice, page 629, section 5. It is an issue that lies distinctly within the province of the jury. "The plea being one of mixed nature involving matters of fact, it is, when not demurrable, a question for

a jury to decide, and it is error for the court to strike it out on motion of the prosecution," etc. And, too, this special plea was based upon section 1762 of the Code of 1906 which reads as follows, to-wit: "What can be proved under prosecution. On the trial of all prosecutions for the violation of law by the sale or giving away of liquors, bitters, or drinks, the state shall not be confined to the proof of a single violation, but may give evidence in any one or more offenses of the same character committed anterior to the day laid in the indictment or affidavit, and not barred by the statute of limitations; but in such case, after conviction or acquittal on the merits, the accused shall not again be liable to prosecution for any offense of the same character committed anterior to the day laid in the indictment or in the affidavit."

Of what purpose are such a plea, and statute, if the defendant is not to be permitted to invoke them? or why not dispense with them?

Carl Fox, assistant attorney-general, for appellee.

By the very terms of section 1762, Code 1906, it cannot apply to the case at bar. At the first trial defendant was acquitted of a sale made by her before the sale for which she was convicted in the case at bar. Section 1762 provides that when the state produces evidence in any one or more offenses of the same character committed anterior to the day laid in the indictment or affidavit, the accused shall not again be liable to prosecution for any offense committed anterior to the day laid in the indictment or affidavit. The indictment was in blank but the day was laid when proof of the date of the sales was made, and in the case at bar, defendant has not been tried for any offense committed "anterior" to the day on which the other sale was made. The trouble with the argument of counsel for appellant is that he is considering section 1763 as a rule of evidence, which conten-

tion this court has expressly denied in the case of *Thomas v. Yazoo City*, 48 So. 821. Under this section it is not competent for the state merely to offer evidence of other sales made prior to the day laid in the indictment for the purposes of proving the specific sale alleged in the indictment. *Harvey v. State*, 49 So. 268.

But the state may prove, if it can do so beyond a reasonable doubt, such other sales as the constituent offense, under the law. Again, the state may elect to proceed, under section 1762, Code 1906, to prove, if it can do so beyond a reasonable doubt, sales anterior to the day laid in the indictment; or the state may elect to stand upon a specific sale alleged in the indictment. *Wadley v. State*, 50 So. 494.

The latter course was pursued by the state in the case at bar; and while evidence was given at the former trial of the sale for which the defendant was tried in the case at bar, defendant was not tried for this offense, and could not have been convicted of it or acquitted. No evidence was given at the former trial of any offense committed anterior to the day laid in the indictment, or even anterior, in point of time, although on the same day.

ANDERSON, J., delivered the opinion of the court.

The appellant, Dorcas King, was convicted in the circuit court of Lauderdale county of the unlawful sale of intoxicating liquors, and appeals to this court. The appellant interposed a plea of *autrefois acquit*. The state neither demurred nor replied to this plea, and the court refused to permit appellant to present to the jury the issue proposed by the plea. The record of the alleged former acquittal, including the testimony introduced on behalf of the state, is made part of the plea, and shows these facts: At the July term, 1909, two indictments were returned against the appellant, charging her with the unlawful sale of intoxicating liquors. They did not

charge to whom the liquors were sold, nor the date of the sales, further than they were made in 1909. The indictments are numbered 2,593 and 2,594, respectively. In August, 1909, the appellant was tried, and acquitted, on indictment No. 2,593. At the same term of the court she was tried and convicted on indictment No. 2,594, which is this case. On the first trial the witnesses for the state were Bob Brown and Susie Thomas. They both testified that some time during the summer of 1909, and shortly before the trial, they went to appellant's house, and witness Brown first bought from appellant six drinks of whiskey, paying therefor ten cents a drink; and then in a short time, from a half an hour to an hour, he bought a bottle from her, paying fifty cents therefor. After proving both of these sales by the witness Brown, the district attorney stated to the court that the state elected to prosecute appellant in that case for the sale of the six drinks of whiskey. The witness Susie Thomas was then introduced by the state, and testified as did Brown, to both sales, both on direct and cross-examination. On the trial of the second case, under indictment No. 2,594, these same witnesses were introduced by the state, and testified to the identical sales about which they testified in the first trial, as shown by said plea of *autrefois acquit*. The district attorney, in the second trial, attempted to have them confine their testimony to the sale of the bottle of whiskey; but in testifying they proved both sales as in the first trial.

The court should have required the district attorney, on behalf of the state, to either demur or reply to the plea of *autrefois acquit*, as in the judgment of the district attorney advisable; and such demurrer or plea should have been in writing. If the facts set out in the plea of *autrefois acquit* were true, the appellant was entitled to a peremptory instruction to the jury to return a verdict of not guilty. Such facts constituted a bar to the prosecution under indictment No. 2,594.

Section 1762, Code 1906, provides: "On the trial of all prosecutions for the violation of law by the sale of giving away of liquors, bitters, or drinks, the state shall not be confined to the proof of a single violation, but may give evidence in any one or more offenses of the same character committed anterior to the day laid in the indictment or in the affidavit, and not barred by the statute of limitations; but in such case, after conviction or acquittal on the merits, the accused shall not again be liable to prosecution for any offense of the same character committed anterior to the day laid in the indictment or in the affidavit." Under this statute, the state may not prove more than one sale, and then elect which sale it will ask a conviction on. The election must be made before the testimony is introduced. As said by the court in *Wadley v. State*, 50 South. 494, in construing this statute: "The state must take the benefits of this statute, subject to its burdens."

The advantage to the state, and disadvantage to the defendant, of permitting the state to prove any number of sales made prior to the indictment, not barred by limitation, is apparent. It is rendered more difficult for the defendant to prepare his defense. He does not know what sales the state will attempt to prove, nor by what witnesses; and where several sales are attempted to be proven, the jury probably requires less testimony to convict, than where only one sale is relied on. To permit the state to prove more than one sale, and then select which one it will ask a conviction on, would be to give it all the advantages of the statute, and relieve it from the burdens imposed by it. If the plea in question is true, this was what was done in this case.

Reversed and remanded.

JOHN H. TURNER v. MARY SIMMONS.

[54 South. 658.]

1. TIME FOR APPEAL. *Failure to give bond in time. Dismissal Code 1906, section 34.*

Under Code 1906, § 34, appeals from decrees overruling demurrers "must be applied for and bond given within ten days after the demurrer is overruled, if in term time."

2. SAME.

This statute is both mandatory and jurisdictional and must be strictly complied with, and the court is without power to graft any exceptions on the statute.

3. SAME.

Where the statute is not complied with the supreme court is without jurisdiction of the cause and the same will be dismissed either on motion of appellee or by the court of its own motion.

APPEAL from the chancery court of Newton county.

HON. SAM WHITMAN, Jr., Chancellor.

Bill by Mary Simmons against John H. Turner. From a decree overruling a demurrer to the bill, defendant appeals.

The facts are fully stated in the opinion of the court.

Foy & Banks, for appellant.

W. I. Munn, for appellee.

ANDERSON, J., delivered the opinion of the court.

Appellee, Mary Simmons, filed her bill in the chancery court of Newton county against the appellant, John H. Turner, to which bill appellant interposed a demurrer, which was by the court on the 14th of June, a day of the regular June term, 1909, overruled. From this decree overruling the demurrer, the court, on the same day it

was entered, made an order granting this appeal to settle the principles of the cause. The appeal bond is dated June 29th, 1910, and marked approved and filed by the clerk July 14th, 1910; such date, approval, and filing being, therefore, more than ten days after the decree overruling the demurrer and granting the appeal.

The authority of chancery courts to grant appeals from decrees overruling demurrers is contained in section 34, Code 1906, which provides that "such appeals must be applied for and bond given within ten days after the demurrer is overruled, if in term time." Statutes limiting the time within which appeals shall be taken are both mandatory and jurisdictional, and must be strictly complied with. The court is without power to ingraft any exception on the statute. When the statute is not complied with, the supreme court is without jurisdiction of the cause, which will be dismissed, either on motion of appellee or by this court of its own motion. This court is without power to make any other order. 2 Ency. Pl. and Prac. 239-243, and notes.

Appeal dismissed.

WM. R. MOORE DRY GOODS COMPANY v. ROWE & CARITHERS,
J. W. JONES, CLAIMANT.

[54 South. 659.]

FRAUDULENT CONVEYANCE. *Sale in bulk. Presumptions. Evidence. Laws 1908, chapter 100.*

The first section of Laws 1908, chapter 100, declares "that a sale of any portion of a stock of merchandise, other than in the ordinary course of trade, or in regular and usual prosecution of the seller's business, and a sale of the entire stock of merchandise in gross shall be presumed to be fraudulent and void as to creditors of the seller unless . . ." A sale in violation of this paragraph is not conclusively presumed to be fraudulent and void as to the creditors of the seller, but the presumption of fraud can only be rebutted by the purchaser at such sale by his showing a compliance with subsections a, b and c of said act.

APPEAL from the circuit court of Tallahatchie county.
SAM C. COOK, Judge.

The opinion in this case is rendered on a suggestion of error. The case on original hearing being reported in 53 South. 626.

Caldwell & Dinkins and *Tim E. Cooper*, for appellant.

Broome & Woods, for claimant.

ANDERSON, J., delivered the opinion of the court.

The decisions of the courts of other states on the question here involved are not controlling with this court, but merely persuasive. If unsound, they are not to be followed. After a most careful consideration of the authorities relied on by appellees, we are constrained to adhere to the opinion formerly announced in this case. 53 South. 626. Our judgment is that the construction therein put on the statute involved is clearly

correct. Taking into consideration the mischief sought to be remedied in connection with the terms of the statute (Laws 1908, ch. 100), any other construction would cause it to fall short of accomplishing this purpose. In the opinion rendered, the court used this language: "The statute fixed as fraudulent and void, so far as the rights of creditors are concerned, all sales made in violation of it, and evidence of good faith and payment of value will not be heard."

We will now elaborate more fully (as probably should have been done in the opinion handed down) our views of the purpose and effect of this statute. The first paragraph of section 1 declares "that a sale of any portion of a stock of merchandise, other than in the ordinary course of trade, or in the regular and usual prosecution of the seller's business, and a sale of an entire stock of merchandise in gross, shall be presumed to be fraudulent and void as against the creditors of the seller unless," etc. A sale in violation of this paragraph is not conclusively presumed to be fraudulent and void as to the creditors of the seller. Such a sale is only *prima facie* fraudulent and void. The presumption of voidness is rebuttable; but how? We answer that the purchaser at such a sale may rebut this presumption in one way only, and that is by showing a compliance with sub-sections (a), (b), and (c). For example, if a debtor sells a stock of goods in bulk, and the sale is attacked by his creditors, the latter, by simply showing a sale in bulk, make out a *prima facie* case of fraud. This *prima facie* case, if not rebutted on behalf of the purchaser by showing a compliance by the seller and himself with sub-sections (a), (b), and (c), becomes an absolute presumption of fraud, entitling them to have the sale set aside.

The provisions of sub-sections (a), (b), and (c) are defensive. They may be availed of by the purchaser in defense of his purchase. Creditors attacking a sale in

violation of the first paragraph are not required, in order to make out their case, to show non-compliance with sub-sections (a), (b), and (c). They may stop in their proof by showing a violation of the first paragraph of section 1. That paragraph creates a presumption of fraud theretofore unknown to the law. Such presumption may be overcome alone in the manner provided by the statute. Had the first paragraph of the statute used the terms "conclusively presumed to be fraudulent, and void as against the creditors of the sellers," still the presumption would not be conclusive, because by its very terms the presumption would be overcome by showing a compliance with sub-sections (a), (b), and (c). The context shows that the language, "shall be presumed to be fraudulent and void," means a conclusive presumption of voidness against all defenses except that provided in sub-sections (a), (b), and (c). Any other construction would make the statute declare a mere badge of fraud. The word "presumed" has no fast and fixed meaning, which may not be changed by the connection in which it is used. In one instance the presumption declared may be only *prima facie*, and in another, conclusive.

Our judgment is that the sales described in the first paragraph of section 1 were intended to be denounced as absolutely fraudulent and void, unless the seller and purchaser had complied with sub-sections (a), (b), and (c).

Suggestion of error overruled.

SMITH, J. (dissenting).

I am of the opinion that this suggestion of error ought to be sustained. My views relative to this matter will be found outlined in the following decisions: *Williams v. Bank*, 15 Okl. 477, 82 Pac. 496, 2 L. R. A. (N. S.) 337; *Thrope v. Pennock Mercantile Co.*, 99 Minn. 26, 108 N. W. 940; *Gilbert v. Gonyea*, 113 Minn. 459, 115 N. W. 640; *Sprintz v. Saxon*, 126 App. Div. 421, 110 N. Y. Supp. 586; *Fisher v. Hermann*, 118 Wis. 428, 95 N. W. 392; *Baumeister v. Fink*, 141 Ill. App. 372.

W. J. WADE AND D. J. WADE v. MRS. O. V. BARLOW.

[54 South. 862.]

1. **WARRANTY DEED.** *New promise. Consideration. Statute of limitations, Code 1906, section 3115.*

Code 1906, § 3115, provides that the completion of the period of limitation shall defeat the right and remedy, but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon. Where a husband and wife made a warranty deed to land and six years thereafter, for the same consideration made another deed to the same party, reciting that it was given to correct a former deed, the six year statute of limitations against an action on the warranty commences to run from the date of the second deed, as the last deed is a new promise of warranty based on a former valid consideration.

2. **BREACH OF WARRANTY.** *Measure of damages.*

The measure of damages for a breach of warranty is the money which the vendee has been and will be forced to expend for the protection of his possession and the perfection of his title and such other damages as may have been covered by the breach of warranty and not necessarily the whole purchase price.

3. **ACQUISITION OF OUTSTANDING TITLE.**

It is a well established general rule that where the purchaser has been put in possession, he cannot afterwards acquire a title and set it up in opposition to the vendor. If he extinguish an incumbrance or buy in an outstanding title, all he can ask or require is the payment of the money he has so laid out.

4. **SAME.** *Privity of estate. Husband and wife.*

This rule is equally operative, whether the purchaser of the incumbrance is by the vendee or his wife. There is such an identity between them that what under such circumstances cannot be done by the husband cannot be done by the wife. The privity of estate between the vendor and vendee is what prevents the purchase.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

Brief for appellant.

[99 Miss.]

Suit by O. V. Barlow against D. J. Wade et al. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Shannon & Street, for appellant.

Appellee is wholly without standing in court. She sues on the deed of 1909, but the proof shows there was no consideration for this deed. If she had sued on the deed of 1903, for which and when the consideration was paid, the suit would have shown on its face that it was barred. Could she on a suit based on the first deed have introduced in evidence the second deed as a new promise to pay? We do not think the proof sufficient to show that the title to the land was in the government, but if the title was in the government, the breach of warranty occurred at the time the first deed was made, and the consideration paid, to-wit: in 1903, and the statute of limitations began to run from the date of the first deed.

Counsel for appellee evidently realize this fact, and based the suit upon the deed of 1909, for which the testimony shows no consideration was paid. In the last analysis, this suit resolves itself into this: The first deed was made and the money was paid in 1903. If the land was government land, the six-year statute of limitations became operative at once, and six years would bar a recovery of the consideration. If the land was not government land appellee is not entitled to recover on a breach of warranty, because she does not show an eviction, so, on either hand of the case, appellee must lose.

J. T. Taylor, for appellant.

In this case appellees acquired substantial rights by the conveyance from appellants. She acquired the use and ownership of the improvements on the land. More than this, she obtained that possession which was indispensable to her husband's entry of the land from the

government as a homestead. These were valuable rights vested in appellants and which they could legally transfer and convey to their vendee.

The testimony shows that Henry H. Barlow, who is the husband of Mrs. O. V. Barlow, made homestead application for this land and received his receipt from the United States government on the 24th day of January, 1910, and therefore was living upon the land as a homesteader and that he has expended the sum of six dollars and nothing more in his efforts to secure title to said land.

One who finds that he has unwittingly attempted to purchase a tract of land, the title to which is in the United States government, need not wait on eviction, but may immediately abandon possession thereof and institute suit for the recovery of the purchase money paid. *Holloway v. Miller*, 84 Miss. page 776. It shows from the evidence that appellee has never abandoned possession of the land, but, on the other hand her husband has homesteaded the land and she, with him, is living upon it and taking advantage of their possession, which they acquired from appellants, and the improvements thereon.

Appellee is estopped by her conduct and that of her husband from claiming the entire purchase price. The amount of their damage is the sum of their rights. To allow them to recover more would be to work a fraud under the guise of law and should not be countenanced.

We would further submit that in view of the fact that Mrs. O. V. Barlow is the wife of Henry H. Barlow, they are one and the same person, so far as this transaction is concerned.

It is a well established general rule, that where a purchaser has been put in possession, he cannot afterwards acquire a title and set it up in opposition to the vendor; if he extinguishes an encumbrance, or buys in an outstanding title, all he can ask or require is the payment of the money he has so laid out. And this rule applies,

whether the purchaser of the encumbrance be by the vendee or his wife; there is such an identity between them, that what under such circumstances cannot be done by the husband, cannot be done by the wife; to permit the husband to homestead the land and then undertake to claim that they are separate and distinct people would be a mere evasion of the rule.

Pack & Montgomery, for appellee.

Counsel for appellants, in their fairness, practically concede that the only question to be decided by this court is whether or not this suit is barred by the statute of limitations.

We submit that there was no completed contract of warranty between the parties until the execution of this deed. Evidently the first deed was wholly void, or so erroneous as to fail to conform to the warranty that appellants desired to make. The appellant Wade testified that the purpose of this new deed was to make good their deed to appellee. Having received the purchase price they acknowledged themselves bound to make good their warranty, and accordingly executed this new deed.

Can a party sell land, get the purchase money, make a void or erroneous deed, wait six years, discover the error, and then make a warranty deed, reciting the same consideration, and then defeat a suit on a breach of warranty because the money was not paid simultaneously with the execution of the deed? Illustrating the same principle, suppose that A should buy a piece of land from B for ten thousand dollars and should pay in cash four thousand dollars, and the balance in six annual installments under contract to make a warranty deed upon payment of the last installment, and that after more than six years from the payment of the four thousand dollars, but before the statute had run against the deed, the title should fail and B should institute suit against A for the breach of warranty, what would be his meas-

ure of recovery? Would it be the ten thousand dollars recited as the consideration in the deed? Would the four thousand dollars be barred? Under appellant's contention the first payment would be barred, but we contend that the foundation of the suit would be the warranty expressed in the deed, and that if all the money had been paid, all of it could be recovered.

Our contention is that this new deed is a new promise of warranty, based upon a former valid consideration, and that it is such a promise as is specially provided for under section 3115 of the Code of 1906.

Appellants might as well contend that a note given in renewal of one barred by limitation, cannot be collected because not founded on a valid consideration, but this section comes to the relief of just such a situation. *Proctor v. Hart*, 72 Miss. 288.

Proof was abundant to show that the land was public land at the time of the execution of the deed sued on. See section 1957, Code 1906; *Hiwanee Lumber Co. v. McPhearson*, 49 So. 741; *Case v. Edgeworth*, 5 So. 783; *Lindsey v. Henderson*, 27 Miss. 508.

Title being in the government is was not necessary for plaintiff to show an eviction. *Pevy v. Jones*, 71 Miss. 647.

The doctrine announced in *Holloway v. Miller*, 84 Miss. 776, does not apply in this case for the reason that the grantee under the warranty did not homestead the land and her measure of recovery would not be limited by the rule laid down in the Holloway case.

Appellee having lost her land is entitled to her remedy on the breach of warranty, and we respectfully submit that this case should be affirmed.

McLAIN, C.

This is an appeal from the circuit court of the second judicial district of Jones county. By agreement, the

case was tried before the circuit judge; a jury being waived. The facts of this case are briefly these:

In 1903, W. J. Wade and his wife, D. J. Wade, for the consideration of one hundred and fifty dollars, executed and delivered a deed to a certain forty-acre tract of land to Mrs. O. V. Barlow. She and her husband, Henry H. Barlow, went into possession of the land under this deed. In 1909, for the same consideration, appellants executed a warranty deed to the same land to Mrs. Barlow, reciting in the body of the deed that "this deed is given for the purpose of correcting a former deed given by W. J. Wade and wife." Just what is meant by the expression, "this deed is given for the purpose of correcting a former deed given by W. J. Wade and wife," is not absolutely clear from the record; but from this record it reasonably appears there was some rumor that the land in question was public land, but evidently appellants did not think so, as W. J. Wade testified that he and wife desired to make good the first deed, and in order to do so executed the second deed to Mrs. Barlow, containing a covenant of warranty. After the execution of the last deed, Henry H. Barlow, husband of Mrs. O. V. Barlow (appellee), discovered that it was public land, and he made homestead application for this land, and received his receipt from the United States government on the 24th day of January, 1910. The record upon the whole shows that the government had never parted with its title.

Mrs. O. V. Barlow, being convinced that the title to the land was in the United States government, instituted suit against appellants on a breach of warranty, and recovered judgment for the purchase price, one hundred and fifty dollars, with ten per cent. damages. The record shows that, while the second deed recited a consideration of one hundred and fifty dollars, yet as a matter of fact nothing was paid. The consideration of one hundred and fifty dollars was paid in 1903, when the first

deed was executed. More than six years having elapsed since the execution of the first deed up to the time of the institution of this suit, it is contended that this action is barred by the statute of limitations. We think this last deed is a new promise of warranty, based upon a former valid consideration. The former legal obligation is a sufficient consideration to uphold a new promise based thereon. Section 3115, Code 1906.

We think the court below committed error in giving judgment for the entire purchase price. The measure of damages, under the facts of this case, should be confined to the repayment of the money that the husband of Mrs. Barlow has expended and will necessarily have to expend in getting the title from the government. In other words, she cannot recover anything except the money which her husband, Henry H. Barlow, has been and will be forced to expend for the protection of his possession and the perfection of his title, and such other damages as may have been caused by the breach of warranty. Full compensation for the breach is the extent of the recovery authorized. This is the universal rule, which is not varied by the fact that the land to which the title failed belonged to the United States government. *Gal-loway v. Finley et al.*, 12 Pet. 264, 9 L. Ed. 1079; *Holloway v. Miller*, 84 Miss. 781, 36 South. 531.

But it may be said that Henry H. Barlow, her husband, and not Mrs. Barlow, his wife, secured the title from the government; that the breach of warranty was upon a deed executed to Mrs. Barlow, and that her husband, Henry H. Barlow, was in no way connected with this deed; and that the husband and wife are separate in property, and may as a rule invest their money or make contracts independent of each other. All this is true. But there is another principle of law, founded upon public policy, that will be invoked in certain transactions to which husband and wife are parties. To explain this, we will begin by stating a rule as laid down

by this court in the case of *Hardeman et al. v. Cowan*, 10 Smede & M. 501: "It is a well established general rule that, where the purchaser has been put in possession, he cannot afterwards acquire a title and set it up in opposition to the vendor. If he extinguish an incumbrance, or buy in an outstanding title, all he can ask or require is the payment of the money he has so laid out. This reason is equally operative, whether the purchase of the incumbrance be by the vendee or his wife. There is such an identity between them that what under such circumstances cannot be done by the husband cannot be done by the wife. The privity of estate between the vendor and the vendee is what prevents the purchase. The wife in some degree partakes of this relation. To permit her to purchase, when the husband is forbidden, would be a mere evasion of the rule."

In the case of *Robinson v. Lewis*, 68 Miss. 71, 8 South. 259, 10 L. R. A. 101, 24 Am. St. Rep. 254, the court said, speaking through Judge Cooper: "If the rule which prevents one spouse from securing a title where the other is disqualified rested only upon a supposed privity of estate between them, it might well be argued that our statutes upon the subject have destroyed its foundation. But the rule is founded upon considerations of public policy, and conclusively imputes to the one, as derived from the other, knowledge of those facts the existence of which precludes the other from action. The opportunities that would be afforded for fraudulent practices would be so numerous, and the difficulty of exposing them so great, that courts apply the doctrine of estoppel to both, and thus close the door that offers the temptation." The principle here announced was again reaffirmed in the case of *Hamblet v. Harrison*, 80 Miss. 124, 31 South. 580, and also in *Beaman v. Beaman*, 90 Miss. 762, 44 South. 987. The facts in the above cited cases are somewhat different from the facts in the one under consideration, yet in our opinion the same principle is

involved. Under the facts of this case, we think Mrs. Barlow, the appellee, is estopped by her conduct and that of her husband from claiming the entire purchase price of this land.

As we have already announced, her measure of damages under the facts of this case, should be confined to the repayment of the money that her husband, Henry H. Barlow, has expended and will necessarily have to expend in getting the title from the United States government. Manifestly, if she had secured the title from the United States government, instead of her husband, this is all she could have recovered on her suit for breach of warranty; and the fact that her husband obtained it gives her no greater claim for damages, when considered in the light of the principles of the law above stated. "To allow her to recover more would be to work a fraud under the guise of law, and this cannot be countenanced." *Holloway v. Miller*, 84 Miss. 781, 36 South. 533.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated by the commissioner, the case is reversed and remanded.

JAS. J. BYERS ET. AL. v. W. E. McDONALD.

[54 South. 664.]

1. NOTES. *Action on condition precedent. Tender. Waiver.*

Where a note is given payable, without condition, on a fixed date in part payment of a right to sell a patent when obtained by the payee, and a contract is entered into at the same time between the parties to the note, which contract does not make the securing of the patent a condition precedent to the liability on the note, the payee of the note may sue on the note when due, before the patent is secured.

2. SAME. *Waiver. Tender.*

Where in such case the maker of the note has notified the payee that he would not accept a transfer of the right to sell the patent, no tender of such transfer was necessary before suing on the note.

3. SAME.

Where it is clear that a tender will not be accepted, it need not be made.

4. CONFLICTING EVIDENCE. *Jury.*

Where the evidence on a material issue is conflicting, it is a question for the jury.

APPEAL from the circuit court of Harrison county.

HON. W. H. HARDY, Judge.

Suit by Jas. J. Byers et al. against W. E. McDonald.

From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Dodds & Leathers, for appellant.

We respectfully submit and insist that the grounds set out by appellee in his motion for the peremptory instruction granted in this case, are wholly insufficient to support said motion under the law controlling this case.

The first ground of said motion is as follows to-wit: "Because the suit was instituted before the plaintiffs had any patent right to convey."

We submit that a sufficient and complete answer to this ground of said motion is the terms of the contract, as a part consideration for which the note sued on in this case was given.

It will be noted that this is not a suit on said contract, but is a suit on the last one of the five hundred dollar notes which was given as a part consideration for said contract. By the terms of the contract, the note sued on in this case matured six months from its date, and of course it is elementary and beyond the pale of argument, that a cause of action accruing to the owners of said note, when the maker of it made default in the payment of said note at its maturity, and according to its terms. In this case, the note matured six months after its date and as it was not paid at its maturity, we take it that it is certainly true that the owners of it had a right to bring suit to enforce the collection of it, as soon as default had been made by appellee in making payment of it.

The second and last ground set up by appellee in his said motion for a peremptory instruction which was granted him by the court below, is in the following language, to-wit:

"Because under the agreement, it was the duty of the plaintiff to tender to defendant a conveyance to the patent to be used in Harrison county, and this the plaintiff has failed to do, and there was evidence introduced to show that said patent was never tendered by the plaintiff to the defendant."

The sole reason why plaintiffs did not tender a conveyance of said patent to Harrison county, to the appellee, is as the evidence in this record discloses, that appellee notified appellant Davis, in writing, that he, the appellee, would not abide by said agreement, and that

he would not receive, or accept the conveyance for said patent, if the same was tendered to him.

"A tender is not necessary, where it appears that if made it would have been fruitless." See Am. and Eng. Law, vol. 128, pages 5, 6, 7, 8. See especially Vol. 28, page 7, sec. 2, and authorities cited thereunder.

As to the testimony in this record touching the material points of this case, we submit that a casual reading of the record will disclose the fact, that almost every material point in the case is controverted, and that the record is full of conflicting testimony on all of said points, and therefore it was a case for the jury.

ANDERSON, J., delivered the opinion of the court.

Appellants, J. J. Byers, W. A. Davis, and F. W. Bell, sued appellee on a promissory note for five hundred dollars, executed by the latter to appellants. After the testimony for both the appellants and appellee was in, the court instructed the jury to return a verdict for appellee, which was done, and judgment entered accordingly, from which appellants prosecute this appeal.

The facts necessary to be stated are: Appellants had applied for a patent for a certain device for treating shingles to preserve them. Appellee bought the right from appellants, to sell this patent, when procured, in Harrison county, agreeing to pay therefor one thousand dollars, for which he executed his two promissory notes to appellants, for five hundred dollars each, dated March 21, 1906, with six per cent interest from date, one due ninety days after date, and the other six months after date. The consideration cited in each is "value rec'd." On the same date these notes were executed, appellants executed to appellee this contract: "For and in consideration of one thousand dollars, five hundred dollars of said amount evidenced by negotiable note due and payable ninety days after date, the other five hundred dollars evidenced by negotiable note due and payable six

months after date, both of said notes to bear six per cent interest until paid, we bind and obligate ourselves to make proper deed or conveyance to W. E. McDonald to the James Byers painting machine and apparatus to Harrison county, Mississippi, giving him the sole right to the sale in and for said county, said deed or conveyance to be made as soon as the patent to said machine is secured, said patent now being applied for."

The suit here is on the second note. Appellee, besides the general issue, interposed two special pleas, setting up in one that the note was procured by false and fraudulent representation on the part of appellants, and in the other a failure of consideration, in that at the time the suit was brought a patent to the machine in question had not been procured, and the right to sell it in Harrison county transferred by appellants to appellee. Issue was taken on the special pleas. There was square conflict in the testimony of appellants and appellee on the issue as to whether the note was procured by fraud. On the issue presented by the other special plea there was no conflict in the testimony. The record shows that the machine was patented July 2nd, 1907, which was after this suit was brought, and that appellants never tendered appellee a transfer of the right to sell it in Harrison county in accordance with the contract, but that the reason such transfer was not tendered, was that appellee, before suit was brought, had notified appellants in writing he would not accept it, declaring the contract canceled.

Appellee's motion for a peremptory instruction is based on two grounds: "First, because the suit was instituted before the plaintiffs had any patent right to convey; second, because under the agreement it was the duty of the plaintiffs to tender to defendant a conveyance to the patent to be used in Harrison county, and this the plaintiffs have failed to do as shown by the evidence."

Appellants had the right, if not paid, to sue on the note after due. The contract, executed at the same time the notes were, and as part of the same transaction, does not (as it might have done) make, as a condition precedent to liability on the notes, the securing of the patent by the appellants. The notes were not payable conditionally, but absolutely. If it had been shown that for any reason appellants could not secure the patent, or had made default in their obligation to make every reasonable effort to secure it, a different question would be presented. No such defense was made. On the contrary, it is shown that the patent was secured before the trial in the court below. Under the facts of this case, admitted by appellee, appellants were not due to make him tender of a transfer of the right to sell the machine in Harrison county before suing on the note. Appellee had waived such a tender by notifying appellants in advance that he would not accept it. When it is clear that a tender will not be accepted, it need not be made. It would be "an idle and unnecessary ceremony." 28 Am. and Eng. Ency. Law (2d Ed.), 6, 7.

The court erred in giving the peremptory instruction. The case should have gone to the jury on the issue whether the note was procured by fraud.

Reversed and remanded

THELMA COLLINS v. STATE.

[54 South. 665.]

1. CRIMINAL LAW. *Impartial jury. Conduct of judge.*

Every accused, irrespective of his guilt or condition in life, is entitled to be tried by an impartial jury.

2. SAME.

Where the presiding judge in the presence of the jury, before whom accused was to be tried by the character of the questions put to accused, brings her cause into contempt, accused is denied a trial before an impartial jury.

3. SAME.

The trial judge must use the greatest care to avoid prejudicing the cause of the state or the defense by his language or conduct.

4. CONDUCT OF JUDGE. *Presumptions.*

The supreme court will not stop to inquire whether the jury was actually influenced by the improper conduct of the presiding judge; if his conduct might have prejudicially affected the jury, the conclusive presumption of the law is that it did so affect their verdict.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

Thelma Collins was convicted of unlawful retailing and appeals.

The facts are fully stated in the opinion of the court.

Bullard & Gavin, for appellant.

Search, I think, will hardly disclose a more glaringly oppressive deprivation of one's right to a fair and impartial trial. She was arrested late in the forenoon of the 10th day of October and then informed for the first time of the indictment. She at once had subpoenas issued for her witnesses, the only ones by whom she could establish her defense, and the sheriff had scarcely had time

to get out of the court house with them before the case was called for trial. These witnesses, if she had been afforded an opportunity to have them present, would have made out a perfect defense. One of them, Bill Hinton, would have sworn that he was present at the time Chas. Jacobs and Jack Welborne, the state's witnesses, claimed she sold whiskey, and that she sold none. The other J. A. Shed, is her landlord, and would have sworn that she was not living at the place where the state's witnesses testified the person was living when they bought the whiskey. This at least would have proved that if they bought whiskey from any one they were mistaken in the identity of the person who sold it. A more perfect defense could hardly be imagined, and yet the court denied her any time whatever to establish it, saying: "I am going to try the case to-day, if it takes till midnight." He did indeed call the jurors to the box who had heard him browbeat her and insinuate improper motives for the presence of Bill Hinton at her house, and went through the form of convicting her, but it was no trial. If indeed it be called a trial, section 26 of the Constitution is a mockery. And this too immediately after the court had compelled her to take the stand and violate her right under said section not to give evidence against herself in the presence and hearing of the very jurors who tried her.

And compelled her to answer when it could serve no purpose other than to prejudice the jurors against her defense, and force her to give up perhaps the only reason she might have had to remain silent at her trial. All this too after the court had before the same jurors browbeat her and by his manner and questions insinuated improper motives for the presence of Bill Hinton at her house.

And all this was without any bearing on her application for a continuance and was heard by the jurors who

also immediately heard him say, "I am going to try the case to-day, if it takes till midnight."

We most earnestly insist that if Bill Hinton is a white man and she is "a nigger" she was entitled to fair treatment and a fair and impartial trial.

We think it unnecessary to cite authority but out of the multitude of others with which the court is familiar, the following are especially in point:

Section 26, article 3 of the Constitution, wherein it is said: "In all criminal prosecutions the accused shall have a right . . . to have compulsory process for obtaining witnesses in his favor" and a fair trial. She was denied the right to have an opportunity to have even one subpoena served and returned. *Cade v. State*, 50 So. Rep. 554, is a much stronger case than this and is exactly in point;

Montgomery v. State, 85 Miss. 330; *Whitt v. State*, 85 Miss. 208; *Hattox v. State*, 80 Miss. 186; *Fooshee v. State*, 82 Miss. 509; *Leroy White v. State*, 45 So. Rep. 611.

Jas. R. McDowell, assistant attorney-general, for appellee.

The only other error assigned is that she was not tried by a fair jury because the members of this jury had heard her testimony taken on the motion for a new trial. There is nothing in this point at all, and I will only cite the case of *Whitehead v. State*, 52 So. 259, which should settle the point raised by counsel here.

ANDERSON, J., delivered the opinion of the court.

The appellant, Thelma Collins, was convicted of the unlawful sale of intoxicating liquors, and appeals to this court.

The appellant made an application for a continuance on account of the absence of two witnesses. When this application came up for hearing, the court called the appellant to the witness stand, and had her sworn, and

examined her. The examination by the court took place in the presence of the jury before whom the appellant was tried and convicted. During her examination by the court, the appellant testified as follows, over the objection of her attorney: "The Court: Q. Bill Hinton (one of the absent witnesses) is a white man? A. Yes, sir. Q. And you are a nigger? A. Yes, sir. Q. He visits your house very frequently, doesn't he? A. No, sir. Q. How often does he come there? A. I owed him for some molasses. Q. Sweet things? A. Yes, sir. Q. Now, wasn't he present there, in the room there, when some of the boys came down there—Bill Hinton? A. No, sir. Q. Never had been there before? A. He had been there before. Q. How many times? A. I bought lots of things from him; he peddles. Q. He had never been in your house? A. He had been in there collecting. Q. How many times? A. I bought some potatoes from him once. Q. Did you pay him the money for them? A. Yes, sir." At the conclusion of her testimony, her attorney stated to the court, "I think, your honor, it would be unfair to try it before the jury here; they have heard the testimony," to which the court responded, "I am going to try the case to-day, if it takes all night." The court then asked the jury if anything came out in the examination of the appellant which would affect them in making up their verdict in the case, to which "some of the jury answered by saying, 'No,' and others by shaking their heads," etc.

The common law, since trial by jury was secured by Magna Charta, the twenty-sixth section of our Constitution, and various criminal statutes of this state, guarantee to a person charged with a crime a fair trial by an impartial jury. This guaranty is to every person, high or low, rich or poor, guilty or innocent. The appellant in this case was denied this right. Here we have the judge, in the presence of the jury before whom the appellant was to be tried, by the character of questions put to

her, bringing her cause into contempt. We reiterate what the court said in *Green v. State*, 53 South. 415: "It is a matter of common knowledge that jurors, as well as officers in attendance upon court, are very susceptible to the influence of the judge. The sheriff and his deputies, as a rule, are anxious to do his bidding; and jurors watch closely his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury to avoid prejudice to either party. 21 Ency. P. and P. 994, 995, and notes. The court will not stop to inquire whether the jury was actually influenced by the conduct of the judge. All the authorities hold that, if they were exposed to improper influences, which might have produced the verdict, the presumption of law is against its purity; and testimony will not be heard to rebut this presumption. It is a conclusive presumption."

Reversed and remanded.

THELMA COLLINS v. STATE.

[54 South. 666.]

1. CRIMINAL LAW. *Remarks of district attorney. Improper evidence.*

Where the district attorney in a prosecution for selling intoxicating liquor referred to the house of accused as a low dive where whiskey and beer was, and where girls stayed and men visited, and said you know what that means; and upon objection to such remarks the court stated, "very well, I think the evidence substantiates that," and admitted evidence tending to show these facts. The conduct and remarks of the district attorney as approved by the court and the error in admitting such evidence prevented accused from having a fair trial.

2. IMPROPER EVIDENCE.

In a trial for the illegal sale of intoxicating liquors, it is improper to allow evidence tending to show that accused kept a bawdy house; such testimony is foreign to the issue being tried.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

Thelma Collins was convicted of the illegal sale of liquors and appeals.

The facts are fully stated in the opinion of the court.

Bullard & Gavin, for appellant.

The district attorney in his argument referred to the house of the defendant as a low dive where whiskey and beer are kept, where girls stayed and where men visited, and added "You know what the means." Means what? That it has any tendency to prove that she sold Charles Jacobson whiskey? He meant for the jury to infer just what he had said, that her home was a low dive, etc., and it was an invitation to them to convict her because as he said she was the keeper of a low dive, and we defy the district attorney to point to one syllable of the compe-

99 Miss.]

Brief for appellee.

tent evidence that proves it, even if it had been a relevant inquiry. Surely a conviction will never be allowed to stand when secured by such passionate appeals as this.

But we apprehend that the most glaring error in the record is the remark of the court in reply to the defendant's exception to the argument of the district attorney. When the defendant objected the court said: "Very well, I think the evidence substantiates that." Substantiates what? Substantiates the statement that the defendant's home is a low dive where whiskey and beer are kept, where girls stayed and where men visited. If that evidence was improper the defendant's objections ought to have been sustained, if not, the court ought to have left the jury freely to weigh it without expressing his conviction that it was proved, and if there is no evidence one way or the other, it is still worse for the court to say that a fact has been proved upon which there is no evidence. It seems to us that a bare statement of it is enough to show its impropriety. The defendant had burden enough to carry to the jury without being loaded down with the passionate appeal of the district attorney, endorsed by the court together with the statement that the evidence proves it. The books, as the court knows, contains numerous authorities in condemnation of such remarks by the court on the evidence, but the latest case in this state seems to be the case of *Sivly v. Sivly*, 51 So. R. 457.

Jas. R. McDowell, assistant attorney-general, for appellee.

It is argued that the court erred in permitting the district attorney to refer to the home of appellant as a low dive where whiskey and beer were kept and girls stayed and men visited.

I submit, that the record sufficiently shows that the house was a low dive kept by a negro woman, where girls

stayed and whiskey and beer were kept, and men visited, for it is in evidence that a great many of them did visit. Several witnesses admitted it themselves. It seems to have been the lowest kind of dive, and it could not have harmed the defendant to have it referred to as such when the record shows plainly that it was.

Likewise, the remarks of the trial judge, when asked to reprimand the district attorney for using such language, could not have harmed the case. The court was not commenting upon the weight of the testimony; he simply advised counsel that the district attorney's comments were within the record, and, therefore, not objectionable.

ANDERSON, J., delivered the opinion of the court.

The appellant was convicted of the unlawful sale of intoxicating liquors, and appeals to this court.

The witness Floyd Holifield, introduced on behalf of appellant, on cross-examination by the district attorney, over the objection of appellant, testified as follows: "Q. She (meaning appellant) keeps some yellow woman with her. Who do you generally see there? I don't mean the names. Do you see white men, or who do you see down there? A. I don't remember who all I have seen down there. Q. I don't mean for you to give me their names. A. I do see white men there. Q. Frequently? A. Not very often. Q. Most every time you go there. Now, what do you go down there for? A. Just bruising around; looking around; walking around. Q. Do you bruise around there in the house? You don't know what all those men go there for, whether they go there to buy whiskey or not? A. No, sir; I don't know." And while appellant was testifying in her own behalf, the district attorney, over the objection of her attorney, was permitted to ask her this question: "Q. Now, as a matter of fact, isn't it true that you have had two or three girls in your house living with you?" In his opening argu-

99 Miss.]

Opinion of the court.

ment to the jury, the district attorney "referred to the house of the defendant as a low dive, where whiskey and beer was, where girls stayed and men visited, and said, 'You know what that means.' " Appellant's attorney objected to these remarks for the appellant, in response to which the court said "Very well; I think the evidence substantiates that."

The testimony as to appellant's guilt is conflicting. Whether guilty or innocent, she was entitled to a fair and impartial trial on testimony pertinent to the issue. This she did not get. It would be hard to conceive of conduct on the part of the court, and of the district attorney, with the approval of the court, more prejudicial to the rights of a defendant being tried for crime than is disclosed by the record in this case. You have here the court admitting testimony against the appellant tending to establish that she was the keeper of a bawdy house—testimony foreign to the issue being tried. You have the district attorney, in his argument to the jury, using that testimony against the appellant with its full prejudicial effect; and, when such argument is objected to by appellant's attorney, you have the judge stating, in the presence of the jury, in substance, that appellant kept a bawdy house.

Reversed and remanded.

SCOTTISH AMERICAN MORTGAGE COMPANY LTD. v. RALPH P.
BUTLER.

[54 South. 666.]

1. DEED OF TRUST. *Substituted trustee. Appointment. Attorney in fact.*
Code 1906, section 3108.

The attorney in fact of the beneficiary of a deed of trust cannot appoint a substitute trustee, where the deed provides for the appointment, "by the beneficiary or any holder of the notes secured or their legal representatives."

2. LIMITATION OF ACTIONS. *Non-residents. Absence from the state.*

Code 1906, § 3108, providing that, if after any cause of action has accrued, the person against whom it has accrued reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action after his return, applies only where a cause of action accrues in the state and the person against whom it has accrued goes from and resides out of the state and has no application where a non-resident alien corporation claimed adverse possession of land, when such possession was by tenant against whom ejectment might at any time have been instituted.

3. ALIENS. *Right to inherit land. Common law.*

The common law, unmodified by statute or treaty, excluded an alien from inheriting lands from a citizen. An alien had no inheritable blood through which title could be transmitted.

4. CODE 1906, SECTION 2768. *Voidable title.*

Code 1906, § 2768, does not render absolutely void title acquired and held by a non-resident alien in violation of its terms but as at common law only voidable at the instance of the state.

5. ALIENS. *Adverse possession.*

Code 1906, § 2768 (Code 1892, § 2439), provides that a non-resident alien may have or take a lien on land to secure a debt and at any sale thereof to enforce payment of the debt may purchase the same and thereafter hold it not longer than twenty years, and during that time may sell the same in fee to a citizen and that all lands held or acquired contrary to such section shall escheat to the state.

but a title to real estate in the name of a citizen of the United States, or a person who has declared his intention of becoming a citizen, whether resident or non-resident, if he be a *bona fide* purchaser, shall not be forfeited by reason of alienage of any former owner or other person.

Section 3092, Code 1906 (Code 1892, § 2732), provides that when a mortgage after condition broken obtains actual possession or receives the profits of the mortgaged land the mortgagor or any person claiming through him may not sue to redeem after ten years from the time at which the mortgagee obtained such possession or receipt, etc. *Held* that a non-resident alien mortgagee obtaining possession through tenants, though under an invalid sale, and holding such possession and receiving the rents and profits more than ten years adversely under claim of title, secured a perfect title as against the mortgagors.

6. ADVERSE POSSESSION. *Nature of title.*

Title by adverse possession may be used as a weapon of offense as well as defense. It is a perfect title and is available to the holder for all purposes whatsoever as a perfect record title.

APPEAL from the chancery court of Franklin county.

HON. J. S. HICKS, Chancellor.

The facts are fully stated in the opinion of the court.

Ratcliff & Truly, for appellant.

It seems clear to us that the question of complainant's alienage cannot be raised in a case like this, by individuals. The complainant acquired possession of the land in an orderly and legal way, and if it had no right to acquire and hold it on account of its alienage, it is well settled by an unbroken line of authorities that proceedings to oust it must be instituted by the sovereign and the sovereign only. An individual cannot do it, especially one who has no right to it himself, or who once having had a right has lost it by the lapse of time. A non-resident alien, who has acquired and is holding real estate in violation of law may lose it by escheat to the state, but he can hold it until a judicial determination of the fact that he is so holding it has been had by an in-

quest of office, at the instance of the state. This seems to be the universal rule announced and supported by all the authorities:

See: *Fairfax v. Hunter*, 7 Cranch 602; 3 L. Ed. U. S. 453; *Osterman v. Baldwin*, 6 Wall. 116, 18 L. Ed. U. S. 730; *Conrad v. Waples*, 96 U. S. 279, 24 L. Ed. U. S. 721; *Phillips v. Moore*, 100 U. S. 208, 25 L. Ed. 603; *Gospel v. New Haven*, 8 Wheat 464, 5 L. Ed. 662; *McKinley Creek Co. v. Alaska Mining Co.*, 183 U. S. 563, 46 L. Ed. 331; *Madden v. State*, 68 Kas. 658, 75 Pac. Rep. 1023; *Belden v. Wilkinson*, 68 N. Y. S. 205; *Smith v. Smith*, 74 N. Y. S. 967; *Oregon Mortgage Co. v. Carstens*, 16 Wash. 165, 35 L. R. A. 841; *American Mortgage Co. v. Tennille*, 87 Ga. 28, 12 L. R. A. 529; *Martin v. Wood*, 9 Mass. 377; *McNair v. Falan*, 21 Minn. 175; *Educational Society v. Varbey*, 54 N. H. 376; *Lee v. Salinos*, 15 Texas 495.

The same principle is involved here as in the case of a national bank acquiring land in a way not authorized by law, and when a national bank does this, only the sovereign can complain. *Reynold v. First National Bank*, 112 U. S. 405, 28 L. Ex. U. S. 405.

The defendants were undoubtedly barred by the ten-year statute of limitation, from bringing this ejectment suit. The trial court held and found as a fact that the complainant had been in the actual adverse possession of the land in controversy claiming ownership for more than ten years before the commencement of the ejectment suit, and yet the court held further that notwithstanding the defendants had been out of possession more than ten years, and their cause of action, if they had any, accrued more than ten years before the filing of the ejectment suit, still they were not barred of their right of recovery. This holding is squarely against the statute section 3090 and 3091, Code of 1906 and 2730 and 2731, Code 1896. In *Railway v. Thomas*, 86 Miss. page 43, it is said:

"If the bill shows on its face that the period fixed by the statute stating the bar has elapsed (that is if the bill showed on its face that ten years had elapsed since the cause of action had accrued) in order to avoid demurrer it must show concealed fraud," etc.

That is to say, when a bill seeking to establish a right to or possession of real estate, shows on its face that the cause of action accrued ten years before the filing of the bill it is demurrable, and certainly this holding follows the plain and unambiguous wording of the statute.

McKnight & McKnight, for appellee.

(A) The sale of the lands in dispute, by Roscoe Stinson, as substituted trustee, appointed by John M. Judah, attorney in fact for appellant, in the place of Albert S. Caldwell, the original trustee in the deed in trust from Nathan Buncley, of date April 26th, 1888, was absolutely void as far as passing title to the lands in dispute is concerned.

The case at bar is, irrespective of the point raised in the above proposition, so identical with the cases of *Allen v. Trust Alliance Co.*, 84 Miss. 319 and *Haggart v. Wilczinski*, 143 Fed. Rep. 22, as to justify the assumption that they were made from the same type.

(B) Appellant, being admittedly a non-resident alien corporation, could not and did not acquire title to the lands in dispute by adverse possession, in the face of the provisions of section 2768 of the Code of 1906.

The provisions of the statute are plain, and the facts of the alienage of the appellant is admitted; therefore, the appellant cannot acquire title by adverse possession.

But, counsel say, admitting this to be true, the fact that the appellant is a non-resident alien corporation can not be availed of, by the appellees, as a defense, but, that the state alone can complain.

All of the cases cited, by appellant in support of this contention, except *Oregon Mortgage Co. v. Carstens*, 16

Wash. 165, 47 Pac. 421, decided by a divided court, and *Goon Gan v. Richardson*, 16 Wash. 373, 47 Pac. 752, have no application to the instant case, because they all go to support the well settled rule of law with reference to the rights of aliens, as between them and third parties and as to collateral attacks, the purpose of which rule being to protect the alien "from being annoyed at the instance of impertinent and spiteful citizens," but which could not be applied to a citizen who is defending the title to or possession of his own land." *Morrell v. Superior Court*, 74 Pac. 686.

The Carstens case and the Richardson case mentioned and excepted above, do bear directly on the question in this case and support the position which appellant is trying to maintain, and they are the only cases to be found, as far as our research has gone, supporting that position, but they have been overruled by the court of the state of Washington in *State ex rel. Morrell v. Superior Court of Stevens County*, decided Dec. 1903, and reported in 74 Pac. 686.

Courts will not aid parties to violate the law and obtain title to land which they are not authorized to hold. *Case v. Kelly*, 133 U. S. 28.

A non-resident alien cannot acquire nor hold; he cannot acquire so as to hold; he cannot hold so as to acquire.

"It is only by virtue of the municipal law of each state or nation, or the law of civilized nations, which is regarded as a part of the municipal law of each, that aliens have any right beyond the jurisdiction of their native domicile." *Heirn v. Birdault*, 8 Geo. Miss. 209.

To allow non-resident alien to acquire title to land by adverse possession, under section 2734, in the face of the prohibition of section 2439, would be to permit the alien to do indirectly and by the proxy of an agent or tenant, that which he may not do directly under the provisions

of section 2439. *Dingey v. Paxton*, 60 Miss. 1054; *Kennedy v. Saunders*, 90 Miss. 541.

There are four cases cited by the Cent. Dig. bearing upon the question of the right of an alien to acquire lands by adverse possession, which are: *Dudley v. Grayson*; *Piper v. Richardson*, 50 Mass. 155; *Overton v. Russell*, 32 Barb; *Leary v. Leary*, 50 How. Practice N. Y. 122.

The appellant's chain of adverse possession for ten years falls short of the requirements of the statute, in that it has not been actual and continuous for the period of ten years, and does not come up to the test laid down by the following authorities: *McCallahan v. Barlow*, 27 Miss. 664; *Adams v. Guice*, 30 Miss. 397; *Tegarden v. Carpenter*, 36 Miss. 404; *McGehee v. McGehee*, 37 Miss. 138; *Nixon v. Porter*, 38 Miss. 401; *Wilburn v. Anderson*, 37 Miss. 155; *Tush-Ho-Yo-Tubby v. Jacob Barr*, 41 Miss. 52; *Hutto v. Thornton*, 44 Miss. 166; *Huntington v. Allen*, 44 Miss. 668; *Rothshilds v. Hatch*, 54 Miss. 555; *Green v. Mizell*, 54 Miss. 225; *Davis v. Bowman*, 55 Miss. 765; *Dean v. Tucker*, 58 Miss. 487; *Alexander v. Polk*, 39 Miss. 737; *Jones v. Brandon*, 59 Miss. 585; *Metcalf v. McCutchen*, 60 Miss. 154; *Golf v. Cole*, 71 Miss. 46; *Railroad v. Buford*, 73 Miss. 498; *Warren County v. Mastro-nardi*, 67 Miss. 273; *Bently v. Callahan*, 79 Miss. 302; *Smith v. Cunningham*, 79 Miss. 425; *Gardner v. Hinton*, 86 Miss. 604; *Kennedy v. Sanders*, 90 Miss. 524; A and E. E. Law, 2nd Ed., vol. 1, pp. 789, 790, 794, 795, 796, 797, 798, 801, 802, 803, 804, 805, 821, 831, 834, 886, 887, 889, 892, and authorities cited, especially at page 892, as to proving adverse possession by general reputation.

ANDERSON, J., delivered the opinion of the court.

This is a bill by the appellant, Scottish American Mortgage Company, Limited, against the appellees, Ralph P. Butler et al., to enjoin an ejectment suit pending in the circuit court of Franklin county, brought by appellees against appellant for the lands in controversy in this

cause. A demurrer was interposed to the bill and overruled in the court below, from which decree an appeal was granted to this court. The question raised by the demurrer was whether the chancery court had jurisdiction. The jurisdiction of the chancery court was by this court upheld. The case as here then will be found reported under the style of *Ralph P. Butler et al. v. Scottish American Mortgage Company*, 93 Miss. 215, 46 South. 829. On being remanded, the bill was answered by appellees, testimony was taken and the cause heard on bill, answer and proofs, and a decree rendered from which this appeal is prosecuted.

The bill sets out substantially these facts: That the appellant is a corporation under the laws of Great Britain, domiciled in Edinburgh, Scotland. That on April 26, 1888, Nathan Bunckley, ancestor of appellees, owned the land in controversy, and borrowed from appellant the sum of five thousand dollars, for the payment of which he executed his promissory notes and a deed of trust on the lands involved to secure the same to A. S. Caldwell as trustee. That said indebtedness fell due, and Nathan Bunckley made default in payment thereof, and, the trustee named in the deed of trust failing to execute the trust, one Roscoe Stinson was by John M. Judah, attorney in fact for appellant, appointed substituted trustee, who in accordance with the provisions of the trust deed advertised and sold the lands therein conveyed on December 30, 1892, which were purchased by said John M. Judah as trustee for appellant, to whom, as such trustee, a conveyance was duly executed by such substituted trustee on January 6, 1893. That from the date of appellant's purchase on January 6, 1893, to the time of bringing of said ejectment suit by appellees on April 7, 1907, appellant had been in the open, notorious, adverse possession of said lands under its said deed of purchase, claiming title thereto against the world. That appellant got a good title to said lands by said foreclos-

ure sale and its deed from the substituted trustee. That appellant has a good title to said lands by adverse possession. That appellees have no title because held out of possession for more than ten years. That, if appellant is mistaken in its claim of title by virtue of said foreclosure sale, and also its claim of title by adverse possession, then it is a mortgagee in possession and entitled to enforce a lien against the lands for the payment of its indebtedness, taxes, etc.

The answer denies many of the material allegations of the bill, and sets up that the foreclosure sale under which appellant claims title was void, because the substituted trustee making it had no right to act as such on account of having been substituted by an attorney in fact for the appellant in violation of the terms in the deed of trust, and that appellant is a non-resident alien corporation, and therefore incapable of acquiring title to land by adverse possession. A decree was rendered declaring that appellant had no title to the lands, either by virtue of its purchase at the substituted trustee's sale or by adverse possession, but that it was a mortgagee in possession and entitled to have the lands charged with a lien for the payment of its mortgage indebtedness, taxes, etc., the appellees to be credited with the rents and profits, and directing an accounting to be taken by a master to ascertain the amount due appellant, and decreeing that the injunction against the ejectment suit be made perpetual. The provision in the deed of trust for the appointment of a substituted trustee is in this language: "In case of refusal, neglect, or incompetency to act as said trustee, or his absence from the state, or his decease, then said party of the third part (appellant) or any holder of said note or notes or their legal representatives can at any time they desire, appoint a trustee in place of the said party of the second part, or any succeeding trustee," etc. The fact is Stinson, the substituted trustee, was appointed by John M. Judah,

attorney in fact for appellant. The court's finding of fact in the decree in reference to the adverse possession of appellant is in this language: "That the complainant (appellant) is not entitled to the relief it seeks based upon the adverse possession of the premises in controversy, because that while it is shown to the satisfaction of the court that it, the said complainant, has been in the uninterrupted, undisputed, open, notorious, and continuous adverse possession of the premises in controversy for a period of more than ten years next before the filing of the ejectment suit by the defendants (appellees) in this cause, yet the court adjudges in this regard that the complainant, being a non-resident alien corporation, cannot acquire title by adverse possession, and cannot therefore set up the statute of limitations of ten years."

The questions involved in this case are as follows: (1) Whether the appellant got a good title to the land in controversy by its purchase and deed under the foreclosure sale by the substituted trustee. (2) Whether appellant had been for at least ten years next before the institution of the ejectment suit by the appellees in the actual adverse possession of the land, claiming for that time to be the owner thereof. (3) Whether, if appellant had such possession, so claiming title, its absence from the state prevented the bar of the statute in its favor. (4) Whether appellant, being a non-resident alien corporation, could hold the lands adversely to appellees so as to thereby bar them of their right of recovery. We will consider these propositions in the order set out.

(1) The power conferred by the deed of trust in this case to substitute a trustee is in substantially the same language as that in the deed of trust under consideration in the case of *Allen v. Alliance Trust Company*, 84 Miss. 319, 36 South. 285. It was held in that case that the attorney, in fact, of the beneficiary could not appoint a substituted trustee. Under the authority of that de-

cision, the substitution of Stinson, by the attorney in fact for appellant, was void, the sale by such substituted trustee was likewise void, and appellant therefore got no title by virtue of its purchase at such sale and conveyance by the substituted trustee.

(2) The finding of the chancellor that the appellant had been in the actual adverse possession of the lands, claiming title thereto and receiving the rents from the date of its purchase at the foreclosure sale in 1893 to the time of the institution of the ejectment suit by the appellees in 1907, will not be disturbed; in fact, there is little testimony to the contrary.

(3) The appellant has always been a non-resident alien corporation. It has never become domesticated in this state. At the time of its purchase of the land under the foreclosure sale by the substituted trustee, and continuously since, the appellant has been "absent from the state." Did such absence from the state prevent its pleading the bar of the statute of limitations? Section 3108, Code 1906, provides: "If, after any cause of action have accrued in this state, the person against whom it has accrued be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action, after his return." It is settled by *French v. Davis*, 38 Miss. 218, *Dent v. Jones*, 50 Miss. 265, and *Lindenmayer v. Gunst*, 70 Miss. 693, 13 South. 252, 35 Am. St. Rep. 685, that the statute has no application to a case like this. As said in *Lindenmayer v. Gunst*, *supra*, referring to section 2478, Code of 1892, of which section 3108, Code 1906, is a rescript, "it applies only where a cause of action accrues in this state, and the person against whom it has accrued goes from and resides out of the state. A non-resident may acquire title to land by adverse possession held for him by others. The action against the tenant would give the possession to the true owner, and prevent the ripening of the possession into

title.” It appears from the record in this case that, covering the period of appellant’s adverse possession, there never was a time when appellees could not have instituted ejectment against appellant’s tenants to recover the land. Its absence from the state did not prevent such a suit.

(4) The common law, unmodified by statute or treaty, excluded an alien from inheriting lands from a citizen. An alien had no inheritable blood through which title could be transmitted. He could take title by grant or devise, but not by descent. He could take by an act of a party, but not by operation of law. By purchase he got a good title against all persons except the sovereign. Such title was subject to be divested by the sovereign upon an inquest of office found. By operation of law, he could get no title whatever either against other persons or the sovereign. The law alone refused to confer title on an alien, because in so doing the public policy was violated. It would not do the vain thing of casting title on him, and then turn around, at the instance of the state, and forfeit such title. His title acquired by grant or devise he could convey to another, who also could hold it subject to the right of the state to divest it. An alien could take a mortgage on realty to secure a debt, but could not purchase at a foreclosure sale of such mortgage and hold the property as against the state. 2 Kent’s Commentaries (14th Ed.) §§ 53-64.

Section 2768, Code 1906 (section 2439, Code 1892), is as follows: “Resident aliens may acquire and hold land, and may dispose of it and transmit it by descent, as citizens of the state may; but non-resident aliens shall not hereafter acquire or hold land, although a non-resident alien may have or take a lien on land to secure a debt, and at any sale thereof to enforce payment of the debt, may purchase the same, and thereafter hold it, not longer than twenty years, with full power during said time to sell the same in fee to a citizen; or he may retain

it by becoming a citizen within that time. All land held or acquired contrary to this section shall escheat to the state; but a title to real estate in the name of a citizen of the United States, or a person who has declared his intention of becoming a citizen, whether resident or non-resident, if he be a *bona fide* purchaser or holder, shall not be forfeited or escheated by reason of the alienage of any former owner or other person." By this statute it will be readily seen that certain features of the common law are modified. So far as it prohibits non-resident aliens from acquiring or holding lands in this state, and in some other respects, it is merely declaratory of the common law. It is evident from a view of the whole statute that it was not the purpose of the legislature to render absolutely void titles acquired and held by non-resident aliens in violation of its terms, but, as at common law, only voidable at the instance of the state. The last clause provides that land held by a citizen or person who has declared his intention to become a citizen, if he be a *bona fide* purchaser, shall not be escheated by reason of the alienage of any former owner. In other words, an alien gets a title defeasible only at the instance of the state. If he got no title at all, a *bona fide* purchaser from him would get no title. His title being merely voidable, under the statute he conveys a good title.

May the owner of land be barred of his right of recovery by the adverse possession of an alien under claim of title for a period of ten years? Or, putting the same question differently, may an alien acquire title by adverse possession against the owner who is a citizen? Is such a title one conferred by operation of law, and prohibited by the principle above stated? It was held in *Piper v. Richardson*, 9 Metc. (Mass.) 155, that an alien may acquire an indefeasible title to land by adverse possession sufficiently long (twenty years) to bar a suit by the commonwealth to recover the land. In *Overing v. Russell*,

32 Barb. (N. Y.) 263, it was held that, although an alien could not acquire title to real estate as against the true owner by adverse possession of twenty years, yet the statute of limitations would furnish a perfect defense to an action of ejectment by such owner. And in *Price v. Greer*, 89 Ark. 300, 116 S. W. 676, 118 S. W. 1009, it was held: "It seems that at common law an alien could take lands only by purchase, and not by operation of law. 4 Moore's International Law, p. 34. The statutes of this state provide that aliens may take lands either by purchase, by will, or by descent. Kirby's Dig., § 264. But it is urged that the investiture of title by limitations is by operation of law, and that the statute does not enlarge the rights of aliens so as to enable them to take title by this method. It is not correct to say that title by limitation is taken by operation of law. The statute of limitations is one of peace and repose, and the effect of the statute bar is to raise a conclusive presumption in favor of the possessor of land. 'The title acquired in such cases,' says a learned author on this subject, 'is predicated upon the presumption that the party in possession is the real owner, or that the real owner has surrendered or abandoned his claim to the premises, or he would have asserted his claim thereto within the requisite period, to save his right.' Wood on Limitations, § 254." In 1 Cyc. p. 1122, the principle is thus stated: "Although not capable of holding real property, an alien may successfully set up the defense of adverse possession against the true owner." In *Oregon Mortgage Company v. Carstens*, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841, it was held that an alien corporation, holding a mortgage on land to secure an indebtedness due it by the mortgagor, could take a deed direct from the latter in satisfaction of his debt, and such conveyance was not violative of the Constitution and statute of Washington, which provided that: "The ownership of lands by aliens is prohibited in this state except where ac-

quired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts," etc. Without referring to the case of *Overing v. Russell*, *supra*, the supreme court of New York held in *Leary v. Leary*, 50 How. Prac. 122, that adverse possession for the period of twenty years, where the occupant had been an alien for five years of that time, did not confer title.

Sections 2730, 2731, 2732, 2734, and 2755, Code of 1892, which are brought forward in the Code of 1906 into sections 3090, 3091, 3092, 3094, and 3115, respectively, provide as follows:

"3090. A person may not make an entry or commence an action to recover land but within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued to some person through whom he claims; or, if the right shall not have accrued to any person through whom he claims, then within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to the person making or bringing the same," etc.

"3091. A person claiming land in equity may not bring suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such estate interest, or right in or to the same as he shall claim therein in equity," etc.

"3092. When a mortgagee after condition broken, shall obtain the actual possession or receipt of the profits or rent of land embraced in his mortgage, the mortgagor, or any person claiming through him, may not bring a suit to redeem the mortgage but within ten years next after the time at which the mortgagee obtained such possession or receipt," etc.

"3094. Ten years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title," etc.

"3115. The completion of the period of limitation herein prescribed to bar any action, shall defeat and extinguish the right as well as the remedy; but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon."

In construing section 3092, Code 1906, this court held, in *Little v. Teague*, 60 Miss. 115, and in *Tuteur v. Brown*, 74 Miss. 774, 21 South. 748, that a mortgagee in possession, receiving the rents and profits, for ten years or more, acquired a perfect title. Our judgment is that under the facts of this case the appellees are barred from recovery by the statute above referred to, and appellant's title is good. Title by adverse possession may be used as a weapon of offense as well as of defense. It is a perfect title. It is as available to the holder for all purposes whatever as a perfect record title. The limitation of the statute bars the right, as well as the remedy. The "true owner" is conclusively presumed to have conveyed his title to the holder of the title by adverse possession. The holder of the title by adverse possession is presumed to be the purchaser, and all inquiry as to whether he is or not is cut off by the statute. As against his adversary, he is presumed to have a perfect record title, from the patent by the government down. Title by adverse possession is not title "by operation of law." It is title by purchase. In order to acquire such a title, the active agency of the claimant is necessary. He must have held the land adversely, claiming title thereto for the statutory period. The title is not cast on him "by operation of law" alone. It is a

title given by law by virtue of a certain state of facts, brought about by the person on whom it is conferred. That is not true of title by descent, which is title by operation of law alone. The appellant, as mortgagee of the land, had the right under the statute to purchase at the mortgage sale and become owner. It had the right to receive a deed from the grantor in satisfaction of the mortgage debt. Failing to get a good title at the foreclosure sale, its possession under the mortgage and receipt of the rents and profits was legal. Such possession and receipt of the rents and profits, having been continued for more than ten years, adversely, under claim of title, ripened into a perfect title as against appellees. The appellant's purchase at the foreclosure sale is conclusively presumed to have been legal. Since preparing the above opinion, the Circuit Court of Appeals for the Fifth Circuit, in *A. N. Bunckley et al. v. Scottish American Mortgage Company, Ltd.* (No. 2,070), 185 Fed. —, which is another branch of this same litigation, has reached the same conclusion as to the last proposition this court did. The court said in that case: "The only debatable proposition is in regard to the appellee's rights as an alien owner of title to the lands in controversy, as to which we conclude that, under section 2768, Code of Mississippi (1906), and other sections cognate thereto, the appellee, having acquired the lands by purchase at a sale to enforce the payment of a lien debt legally held by it, is the legal owner and holder, subject only to the right of the state to escheat the same after twenty years' holding, and that, as such owner and holder, it is entitled to all the protection and defenses available to other legal owners of land, and therefore that, when its title is attacked or questioned, it may benefit by showing adverse possession, under title for a period of ten years."

Reversed and decree here for appellant.

OSCAR PAGE v. STATE.

[54 South. 725.]

CRIMINAL LAW. Carrying concealed deadly weapon. Threats.

It is a good defense to a prosecution for carrying a deadly weapon concealed, that defendant had been informed of threats of violence against him which he had reasonable grounds to believe and did believe were true.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Oscar Page was convicted of carrying concealed weapons and appeals.

The facts are fully stated in the opinion of the court.

Wells & Wells, for appellant.

Having proceeded to deny poor Oscar any instructions at all in his behalf, the court then proceeded to give one instruction for the state which was intended and resulted in putting a quietus on Oscar's defense, which instruction is as follows, to-wit:

"The court instructions the jury for the state that if you believe from the evidence beyond a reasonable doubt that the defendant carried a pistol upon his person then it is the sworn duty of the jury to return the following verdict: We, the jury find the defendant guilty as charged and this is true even though you may believe all of the testimony offered on behalf of the defendant."

In the first place this instruction even if properly given including the word "doubt" in the second line was omitted, it would be fatally erroneous because the defendant had a right to have the jury pass upon whether or not the threats were made as testified to by defendant and other witnesses both for the state and the defendant.

It was patent error for the court to charge peremptorily as it did in said instruction for the jury to find the defendant guilty as charged even though the jury might believe all of the testimony offered on behalf of the defendant. If the jury believe the testimony for the defendant, he was certainly entitled to an acquittal at their hands because the statute expressly gives the right to the defendant to carry weapons concealed in whole or in part when his life is threatened. The Constitution of the state gives to every citizen the right to bear arms, which right, however, is limited by statute that they cannot be borne concealed in whole or in part except under certain circumstances. The statute expressly says, section 1105 of the Code of 1906, as follows, to-wit:

"Any person indicted or charged for violation of the last section may show as a defense . . . (A) That he was threatened and had good and sufficient reason to apprehend a serious attack from an enemy, and that he did so apprehend."

Carl Fox, assistant attorney-general, for appellee.

After reading this argument carefully several times, I am wholly unable to make any argument for the state without doing violence to a firmly fixed personal opinion that the learned circuit judge erroneously dispensed with the services of the jury in the case.

McLAIN, C.

Appellant was convicted in the circuit court, second district, of Hinds county, for carrying concealed a deadly weapon. From this judgment, he appeals to this court.

The assistant attorney-general, Mr. Carl Fox, with commendable fairness, admits in his brief that this case should be reversed for error therein contained. We fully concur in this view, after a careful examination of the record. Upon the trial of this case the court instructed the jury, for the state, that: "If you believe

from the evidence beyond a reasonable doubt that the defendant carried concealed, in whole or in part, a deadly weapon, to-wit, a pistol, upon his person, then it is the sworn duty of the jury to return the following verdict: 'We, the jury, find the defendant guilty as charged.' And this is true, even though you may believe all of the testimony offered in behalf of the defendant."

Under the facts of this case, this instruction was error. A careful review of the record clearly shows that there was sufficient evidence of threats in this case, so as to have warranted the trial judge in granting the instruction, asked by the defendant, to the effect that the issue presented for the consideration of the jury is whether or not they believe that threats of violence were made against the defendant, and communicated to him, and that, if they so believe that such threats were so made and communicated to defendant, and that he had a reasonable ground to believe the same, then it was their duty to acquit defendant. The instructions asked by the defendant should have been given by the court.

We think the case should be reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated by the commissioner, the case is reversed and remanded.

S. L. ALLEN v. R. N. MILLER ET AL.

[54 South. 731.]

1. DEEDS. *Covenants of warranty. Breach. Damages. Subrogation.*

The limit of a warrantor's liability for breach of warranty is the amount of the purchase price with interest, but the warrantor can only be made to pay the warrantee the actual amount paid out by him to protect his title.

2. DUTY OF WARRANTEE.

While the warrantee is not put to the useless expense of a fruitless litigation against an incumbrance or paramount title that must eventually prevail, yet he assumes the risk of judging correctly as to the title or incumbrance which he buys in, and must establish, as a condition precedent to his recovery either at law or equity, that it was a paramount title or lien covered by his warranty and that he acted under a necessity to save the estate.

3. COVENANTS. *Breach. Defenses.*

That a warrantee of a title based on a mortgage foreclosure sale, on the foreclosure being held invalid, took a quit claim deed from the mortgagor, did not relieve the warrantor from liability for breach of covenant, though the quitclaim deed was without consideration and was taken with intent to prejudice the rights of the warrantor.

4. COVENANTS. *Actions. Defenses.*

T executed a trust deed to a mortgage company to secure a loan, and on default the land was sold by a substituted trustee and bid in by the company, which thereafter sold it, and M acquired it by mesne conveyances, and conveyed to A with covenants of warranty; he taking possession. Thereafter T sued to cancel the conveyance to the mortgage company and all subsequent conveyances, on the ground that the appointment of the substituted trustee, by whom the land was sold, was not filed for record; and all subsequent grantees were made parties, and the decree canceled all of the conveyances, and ordered T to pay the debt to the mortgage company, and, on his failure to do so, that the land be sold to pay the debts. A thereafter secured a quit claim deed from T to the land, without notice to M, and thereafter sued M for breach of

Brief for appellant.

[99 Miss.]

covenant of warranty to recover the money paid to T. The mortgage company meanwhile assigned its claim as fixed by the decree to M. who sued to enjoin A's suit, and seeks to set it off against A's claim for breach of warranty. *Held* that, to avoid a circuitry of action, M could set off his claim under the decree, which was for an amount as large or larger than A's claim, against the latter's claim for breach of covenant of warranty.

APPEAL from the chancery court of Copiah county.

HON. H. CASSIDY, Special Judge.

Suit by R. N. Miller against S. L. Allen et al. From a judgment overruling a demurrer to the bill defendant, Allen, appeals.

D. M. Miller, for appellant.

It is well settled in this state that the covenantee may purchase a paramount title which is being asserted against him, and under which he must ultimately be evicted. This amounts to a constructive eviction and he may sue upon the covenant. See *Kirkpatrick v. Miller*, 50 Miss. 521; *Dyer v. Brittain*, 53 Miss. 270; *Cummings v. Harrison*, 57 Miss. 275.

The covenantee may recover in such action the full amount expended by him in good faith in protecting the title conveyed to him by his warrantor, and other such damages as he has sustained, not exceeding the purchase money together with interest thereon. See *Holloway v. Miller*, 84 Miss. 776; *Brooks v. Black*, 68 Miss. 161.

We contend that since the sale made by Willing, substituted trustee, was void, Lyell, trustee, or the Bank of Wesson, having paid the mortgage company debt, then Lyell, trustee, became the equitable assignee of that debt and is subrogated to all rights of the original *cestui que trust*, and through the subsequent conveyances from Lyell to Miller and from Miller to Allen, this equitable right passed to Allen. Allen, who is in possession of the land, under his warrantor, Miller, and his remote vendors, Lyell, Bank of Wesson and Earnes, is the only

person who can enforce such equitable right in a court of equity. See *Bonner v. Lessley*, 64 Miss. page 392; 56 Miss. 553.

Allen, as the equitable assignee of the original mortgage debt had a right to use this claim in the settlement with Tillman, as doubtless he did, and so long as he acted in good faith with Miller, such use of the debt cannot be questioned.

We contend that all the rights, both legal and equitable to the land passed from Miller under his deed to Allen, and that Miller cannot assert this claim against Allen as a set-off to the damages suffered by Allen by reason of the failure of warranty in Miller's deed. For this reason we maintain that the court should have sustained the demurrer of Allen to the bill of complaint and that it was error for the court to overrule the demurrer. For this reason, we think the decree of the chancellor should be reversed.

R. N. Miller, for appellee.

Miller files his bill in the chancery court and enjoins Allen's suit at law, and tenders Allen the incumbrance, that is, asks that demand of Allen against him be offset against the debt fixed by the decree, held by Miller. Miller is not setting up the decree or incumbrance against Allen, except so far as is necessary to discharge his liability under his covenant of warranty to Allen.

The law of the case is simple. It cannot be disputed that neither Miller nor Allen could acquire an outstanding title or incumbrance and set it up to defeat the rights of the other to the title warranted. *Kirkpatrick v. Miller*, 50 Miss. and a number of other similar cases.

In the first place, Allen could not sue Miller at all for the money by him paid out to Tillman because he did not buy from Tillman the paramount title, and it is perfectly well settled that the vendee in buying an outstanding title is bound to act in good faith with his vendor and he must

buy the title which is not only paramount to his own title, but it must be paramount to the title of everybody else to the land. *Dyer v. Britton*, 53 Miss 270; 11 Cyc. 1125, note 98, and cases cited.

"In order to constitute a breach of covenant of warranty the title or right to which the covenantee yields must be not only paramount to his own title or right but must be paramount to that of anyone else." 11 Cyc. *supra*.

There is a distinction between setting up an outstanding title by a covenantor and asking credit for it by way of discharge of his covenant, which counsel for the appellant seems to have overlooked. I repeat I am not setting up this decree as against Mr. Allen's title; I am simply asking that it be offset against his demand against me for breach of covenant. If I had bought an outstanding title and the paramount title, and thus making my warranty good.

On account of the peculiar facts of this case, I have only been able to find one case precisely like it. And that is *Pres. Fellows of Middleburg College v. Joseph Cheny*, 1 Vermont 336.

Argued orally by *R. N. Miller*, for appellant.

McLAIN, C.

The appellant, S. L. Allen, brought suit against R. N. Miller in the circuit court of Copiah county for a breach of warranty of title to land. Miller filed a bill in the chancery court of Copiah county, enjoining the suit at law, to which bill Allen demurred, and which demurrer was overruled by the chancellor, and from that decision, overruling the demurrer, Allen appeals to this court.

To have a clear conception of the legal points involved, it is necessary to give some of the leading facts. In 1892 W. A. Tillman negotiated a loan of money from the British & American Mortgage Company, executing a

deed of trust to it upon certain lands to secure the payment of the loan. Default in payment was made in January, 1897. The amount then being due was five hundred and seventy-five dollars. The mortgage company desired to execute the trust. The original trustee being a non-resident and refusing to act, another was appointed substituted trustee in writing; but unfortunately this appointment of substituted trustee was not filed for record until after the sale was made. At the sale of the property, the mortgage company bid the land in for the amount of the mortgage debt; the substituted trustee executing to it a deed of conveyance. On September 19, 1900, the mortgage company sold the land to one E. A. Earns, executing a special warranty deed. Some time afterwards, Earns went into bankruptcy, conveying the land to J. G. Lyell, trustee, who in turn sold the land to R. N. Miller, on the 24th day of August, 1901. Soon thereafter R. N. Miller conveyed the land to S. L. Allen for the consideration of nine hundred dollars, executing and delivering to Allen a deed of conveyance containing a covenant of warranty. Under this deed Allen went into possession of the land, and has been in possession continuously since. It appears that all of these conveyances were for about the same consideration, that being the amount of the balance of the debt due by Tillman.

On the 12th day of March, 1906, W. A. Tillman, the original owner, filed a bill in the chancery court of Copiah county, attacking the validity of the deed from the substituted trustee and all subsequent conveyances, chiefly upon the ground that, at the time the land was sold to the mortgage company, the appointment of the substituted trustee was not filed for record. Lyell, Miller, and the British & American Mortgage Company were made defendants. Allen filed an answer, and the mortgage company also filed one, making its answer a cross-bill, and asking that, in the event the conveyances were canceled, Tillman be made to do equity by paying the debt. The

chancellor canceled all of these conveyances, as prayed for by Tillman. It was further ordered that Tillman pay the debt to the British & American Mortgage Company, with interest, and, if he failed to do so, decreed that the land be sold to pay the debt. Allen was never evicted, but in that condition of things, with actual notice of this decree, fixing the debt as a charge upon the land, Allen secured from Tillman, without any notice to Miller, a quitclaim deed to the land, and claims to have paid about nine hundred dollars for it. Soon thereafter Allen sued Miller for breach of covenant for the money paid out to Tillman by him.

The British & American Mortgage Company made an assignment of its claim to R. N. Miller, and thereupon Miller filed this suit, and enjoined the suit of S. L. Allen in the circuit court as heretofore stated. He asks that the debt fixed by the decree be taken as an offset against Allen's demand against him. It is alleged that this decree and the debt thereby fixed upon the land due by Tillman, is equal to or larger than Allen claims to have expended in purchasing the quitclaim from Tillman. The foregoing are some of the leading facts in the case.

It is contended by appellant in his brief that all the rights, both legal and equitable, to the land, passed from Miller under his deed to Allen, and that Miller cannot assert this claim of the British & American Mortgage Company against Allen as a set-off to damages by Allen, by reason of the failure of the warranty in Miller's deed. In other words, the appellant seems to contend that Allen, being the last vendee in the chain, was subrogated to the mortgage company's right to the debt, and that, therefore, Miller cannot set it up by way of offset. Under the facts of this case, we do not concur in that view. The main question presented in this case is whether or not Miller can tender Allen this outstanding incumbrance, which is equal to or larger in amount than Allen's demand against Miller, in discharge of his liabil-

ity under his covenant of warranty. All that Allen got from Tillman by the quitclaim deed was Tillman's equity of redemption. He did not secure by this deed the paramount title. This was outstanding, as Allen well knew, in the mortgage company.

The chancery court, in canceling the deeds heretofore described, in that very decree directed that Tillman pay the debt, with interest, then due the mortgage company, and further ordered that, in default of this payment by *Tillman*, the land be sold to satisfy the debt; and this debt, thereby fixed upon the land by the court, is alleged to be more than Allen claims to have expended in purchasing the quitclaim deed from Tillman. Miller admits his liability upon breach of warranty of his deed to Allen. The measure of his liability to Allen on this breach of warranty is the amount of purchase price paid by Allen to Miller, with interest. In no case would Miller be liable to refund more than was actually paid out by Allen to protect his title, and in no event in excess of his liability on his covenant of warranty. Miller is not attempting to set up this decree against Allen's title, but insists that it inures to his own benefit in discharge of his warranty, and is asking that it be taken as an offset against Allen's demand for breach of warranty.

It is alleged that Allen acted in bad faith with Miller. That is a matter the chancery court can consider, if it becomes necessary or proper to do so, after hearing all facts in reference thereto. It is the province of that court to render redress according to the principles of equity and good conscience. In cases of this character, the doctrine of that court is "that he must deal fairly and in fidelity to his warrantor; that while he will not be permitted to break an allegiance to the title under which he entered and holds possession, yet he shall not be put to the useless expense of a fruitless litigation against an incumbrance or paramount title, which must ultimately prevail, but may, if necessary to preserve the estate and

the possession, pay off the one and buy in the other, and for such outlays of money, he shall be reimbursed." *Dyer v. Britton*, 53 Miss. 278. We will make this further observation, while on this point, that it is a principle of law worthy to be considered in relation to this question, in the event it becomes necessary to do so by the chancery court, "that the covenantee assumes the risk of judging correctly as to the character and validity of the incumbrance or title which he buys in. He must establish, as a condition precedent to recovery, either at law or in equity, that it was a paramount lien or title against which the warrantor was bound to defend, and that he acted under a necessity to save the estate." *Dyer v. Britton*, 53 Miss. 279.

It manifestly appears from this record that Miller is liable to Allen upon his covenant of warranty in the sum of nine hundred dollars, with interest, and this is the limit of his liability. It is equally manifest that Miller has a decree of the chancery court, fixing a charge upon this land for an amount as large or larger than Miller's liability. We think Miller has the right to offer this decree as an offset to Allen's claim, and that the bill is properly before the chancery court, and that it is the correct forum in which to settle the questions here involved, which are somewhat complicated, and, at first impression, somewhat elusive, if not firmly grasped by the mind of the reader. If Miller's tender of the mortgage debt is not an offset of his liability, then it must follow that Miller must pay Allen the money he paid for the land, with interest, and Allen in turn must pay Miller the amount of the debt (decree) fixed upon the land by the decree, or suffer the land sold under the decree. This kind of procedure would be swapping dollars, and such circuitous actions should not be encouraged when it can be avoided.

If this decree owned by Miller is equal to or in excess of his liability to Allen upon breach of warranty of his

99 Miss.]

Brief for appellants.

deed to Allen, we think it ceases to be material or important, so far as Miller's liability on warranty is concerned, whether the quitclaim deed from Tillman to Allen was with or without consideration, or executed and delivered by collusion, with intent to prejudice the rights of Miller. *Affirmed and remanded.*

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated by the commissioner, the case is affirmed and remanded.

H. C. MAGEE AND RICH MAGEE v. STATE.

[54 South. 802.]

CONTEMPT PROCEEDINGS. *Evidence. Sufficiency.*

In a contempt proceeding for interfering with a decree awarding the custody of a minor child to his father and depriving the defendants of his custody, evidence that defendant gave the minor bread to eat, shelter under their roof and refused to take him back to his father's house, coupled with the fact that defendants did not entice the boy away from his father and made no effort to detain him at their home is not sufficient to warrant defendant's conviction for contempt.

APPEAL from the chancery court of Jefferson Davis county.

HON. R. E. SHEEHY, Chancellor.

The chancery court adjudged H. C. Magee and Rich Magee guilty of contempt and they appeal.

The facts are fully stated in the opinion of the court.

McIntosh Bros., for appellants.

A reading of the whole record in our opinion develops the fact that appellants turned over the child voluntarily

to the custody of Pleas Walker, and because Buford would not stay with Pleas, his father, because he ran away and kept himself hid, and because appellants would not run him away from their premises, or take him by force and carry him back to appellee on his demand, the court has adjudged them guilty of contempt. We submit that the facts in the case, conceding that the original order on the *habeas corpus* proceedings was violated, did not warrant the judgment.

Jas. R. McDowell, assistant attorney-general, for appellee.

The whole conduct of appellants show bad faith and shows a constructive contempt of the decree of the court. The chancellor, if he wishes to enforce his orders, must punish those who disregard them.

McLAIN, C.

This is an appeal by appellants from an order of the chancery court of Jefferson Davis county, adjudging them guilty of constructive contempt of court, for violating and willfully interfering in the execution of a decree of that court, rendered on the 21st day of March, 1910, wherein it was decreed that Pleas Walker be awarded the custody and control of one Buford Walker, a boy about ten or eleven years of age. A brief history of the case may be necessary to a clear conception of the questions here involved:

Rich Magee was the father of two children, one a son by the name of H. C. Magee, one of the appellants in this case, and the other a daughter, the mother of the boy involved in this litigation. This daughter in her lifetime gave birth to a bastard son, Buford Walker. It is admitted by all parties that Pleas Walker is the father of the boy. After the death of the mother of this boy, he lived with his maternal grandfather and uncle, the two appellants here. A writ of *habeas corpus* was in-

stituted by Pleas Walker against appellant, Rich Magee, for the care and custody of the boy. On the 21st day of March, 1910, the court granted an order awarding Pleas Walker the child. Soon thereafter appellant delivered possession of the boy to Pleas Walker, who took him to his home, some six or seven miles from the home of appellants. The boy remained a few days with his father, when one night he slipped away, going back to his grandfather's and uncle's home, appellants in this case. Immediately Pleas Walker went to appellants' home, to recover possession of the boy. The grandfather freely admitted that, on the night the boy escaped from his father's home, he came direct to his house, arriving there after he had retired, and knocked upon his door for admittance, and he let the boy in, giving him a place to sleep; and he further admitted that he was there with the children out at play somewhere on the premises, and expressed a willingness for Walker to get him. As soon as the boy saw Pleas Walker, he fled. Walker made repeated efforts to get the boy, but it seems that the moment the boy discovered him, or any one else looking for him, he would take to the woods. On one occasion, a friend of Walker's got possession of the boy at a certain church, placing him in a buggy, and started with him for Walker's home; but on the way he suddenly leaped from the buggy and escaped. A short time after this, the boy left that neighborhood and went to the home of a near relative whom he knew, and pending the trial of this cause he was there living with this relative, attending school. The grandfather frankly admitted that he suffered the boy to eat at his home with his children whenever he came in with them. When threatened with prosecution for failure to produce the boy and turn him over to his father, he said in substance: "All right; if they think they can do anything with me, just go ahead. He is my grandson, and under the circumstances, I will divide what little I have got to eat with him, as long as

I have got anything to eat"—stating at the same time that he had nothing to do with the boy being carried to Pleas Walker's home, and that he had nothing to do in causing the boy to run away from there, and that he was not going to have anything to do with sending the boy back; that he did not feel like it was his duty to take the boy back by force, and he was not going to do so; that the boy was as "wild as a buck," and, whenever he saw any one from the neighborhood of Pleas Walker's, that he would flee. Both of appellants bitterly deny that they aided or abetted in his escape from the possession of Walker, and that they were not then advising him to stay away from Walker's home, and that Walker was perfectly welcome to take him; but that they did not feel that it was incumbent upon them to seize the boy and take him back to Pleas Walker's, or to forcibly seize him and hold him captive until his father could come and get him.

It is manifest from the record that the appellants turned the boy over voluntarily to the custody of Pleas Walker, as directed by the decree of the court; that the boy would not remain with his father; that he ran away, and kept himself hid from his father, or any one else in search for him. It is also manifest that appellants would not deny him admittance to their home, nor take him by force to his father's. But they bitterly denied that they aided in the escape of the boy, or that they were then advising him to stay away from his father's. It is equally manifest that appellants sympathized with the boy with all their heart, and regretted that the court was forced to give the possession of the boy to his father. The fact that appellants, under the circumstances as related, gave him bread to eat, shelter under their roofs, and refused to take the boy to his father's home, are not, within themselves, sufficient facts to adjudge them guilty of contempt. Some stress is laid on the fact that, when appellants delivered the boy to his father, in obedience to the decree of the court, the grandfather, in bidding

him good-bye, said: "Come back to see us whenever you want to." This was a very natural expression. Indeed, the decree of the court provided that he should be permitted to visit his relatives at times.

It is further contended that a boy of such tender years would not have plunged into the darkness of night alone to make this journey of seven miles to his grandfather's home. Barring this conjecture, there is nothing in the record that hints, or suggests, that any one accompanied him on this trip; but, on the contrary, his grandfather says that, when the boy knocked at his door late at night for admittance, he was alone. It is manifest that the boy went to his father's home against his will. His father himself, his father's home and surroundings, were strangers to him, so to speak. He doubtless longed to return to the scenes of his childhood ramblings, and to the bosom of those whom he knew and loved. He knew no other persons and no other place, and all this was dear to him and lay near his heart. Perhaps being inspired by these sacred sentiments, he was nerved to brave the darkness of the night to reach them. Be that as it may, it is manifest he had made up his mind not to stay with his father, if he could possibly avoid it. This is rather borne out by his general conduct, and especially emphasized by the fact that, when captured and placed in a buggy, as heretofore described, he leaps therefrom, making good his escape.

There are some circumstances in this case suggesting the guilt of defendants; but, taking all facts and circumstances into consideration as contained in the record, we are unwilling to affirm that there is sufficient proof to show, beyond a reasonable doubt, that defendants are guilty of the contempt as charged, and we think the case should be reversed, and the cause dismissed.

Reversed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated by the commissioner, the case is reversed, and the cause dismissed.

YAZOO & MISS. VALLEY RAILROAD CO. v. C. M. BROWN.

[54 South. 804.]

1. NATURAL WATER COURSES. *Change of stream. Damages.*

Where a stream has left its accustomed channel, and formed a new channel on the land of an adjoining riparian owner, the latter has the right, by the erection of barriers, to turn the waters of such stream from the new to the old channel.

2. SAME.

In such case the riparian owner, on whose land the new channel is formed is not required to first clean out such old channel so as to restore it to the depth and condition it was in before the stream changed its course.

3. SAME.

By condemnation of, or deed to its right of way, a railroad acquired the right to make necessary excavations to build its roadbed and if in properly constructing such roadbed, it results in a creek leaving its old channel, still the railroad had the right to turn it from its new back to its old channel.

APPEAL from the circuit court of Wilkinson county.

HON. H. M. WILKINSON, Judge.

Suit by C. M. Brown against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Mayes & Longstreet, for appellant.

The one and only issue involved is, we repeat, was appellee guilty of actionable negligence in forcing the

stream back into its original channel without removing the accumulated sand and gravel which had partially filled it?

Now it is an established and elementary principle of law that a riparian proprietor has the right by erecting barriers where a new channel has been formed, on his land, to return the waters from the new channel to the old one, and he is not responsible for any damage done to his neighbor so long as his operations tend to confine the waters within their original channel. American and English Ency. Law, vol. 30, 364; Gould on Waters, § 204, 3rd Ed.; Jones on Easements, 735; Angel on Water Courses, §§ 333, 334; Washburn on Easements, chap 3., § 3, par. 47; see also *Tuthill v. Scott*, 5 Am. Dec. 301.

We quote from the opinion in the latter case:

"Aqua currit et debet currere ut currere solebat. Angel, sec. 93. According to old maxim the water of this stream ought to have run in the old channel and no one could justly complain that any one who had a right to have it run there made it run there.

"Plaintiff appears to have made the waters of the stream to run in the old channel to relieve his land of inundation. This it seems he had a right to do, and when done the stream was as rightful in the old channel as if it had not left it."

See, also, *Slater v. Fox*, 5 Hun 544, 101 Fed. Rep. 678, and particularly, *Pierce v. Kenney*, 59 Barb. 56, the last of which is the leading case on this subject.

So far as we have been able to find, the principles laid down in the opinion in this case have never been questioned.

As will be seen, it disposes of the very question which we are considering in this particular case.

This case held, quoting from the syllabus, that "Where a stream running across defendant's land and thence upon the plaintiff's land, during a flood broke through its bank making an opening sufficient to carry all the water

ordinarily running, and through this new channel the water would have continued to run, if not prevented; held that the defendant had a right for his own protection to erect a barrier or levee across the crevasse or new channel for the purpose of confining the water within the original channel, provided he did not build such barrier too high nor project it into the stream so as to prevent the water running in its accustomed channel, and with its usual force. Held also that defendant was not bound to keep the original channel of the creek open upon his own lands as a condition to his right to maintain such barrier, and that he was not liable to the plaintiff for any damage that might ensue from failure to do so."

J. M. Foreman and Shannon and Jones, for appellee.

Even, if for the sake of the argument, we were to admit that defendant could build any sort of dam for his protection, he could not still have built the dam in question because the dam actually built did not protect. Plaintiff nowhere insisted on their moving any sand or gravel, and if defendant had moved the sand and gravel, the height of the dam would still have caused the ruin of plaintiff's land in spite of the old channel being open.

That portion of the authorities quoted in defendant's brief certainly do not favor his case. If "*aqua curret et debet currere ut currere solebat*," then this water should have run down the new channel as it had done at such a stage for over twenty-five years. In *Pierce v. Kenny*, the maxim applies to the old channel exclusively. The crevasse had just been made by the operation of the water unaided by the party stopping the crevasse and was at once checked by the stopping said crevasse promptly, and not by building a dam more than half way to the conflux of the old and new channel more than twenty-five years later. The two and one-half extra feet on the dam would have in any event overflowed plaintiff's land far deeper than it would have overflowed from

either channel. Without it the worst damaged land would not have been submerged.

ANDERSON, J., delivered the opinion of the court.

The appellee, Brown, sued the appellant, the Yazoo & Mississippi Valley Railroad Company, for damages claimed to have been sustained by him through the inundation of his land, caused by a dam built by the appellant to divert Foster's creek from its new channel on appellant's right of way to its old channel on the land of appellee. From a judgment in favor of the appellee for five hundred dollars, appellant prosecutes this appeal.

Appellee's land adjoins appellant's railroad right of way. Until some time in the spring of 1908, Foster's creek ran through appellee's land in the same general direction of, and only a short distance from, the railroad, being nearer at some points than at others. Appellant's road was constructed more than twenty years before the alleged injury complained of. In its construction, where it adjoins appellee's land, the railroad track is laid on an embankment, or fill, which was made necessary on account of the land traversed being low. The building of this embankment necessitated excavations from the right of way on either side, leaving depressions. During an overflow in the spring of 1908, the waters of Foster's creek left their old channel on appellee's land, and broke over into the depression so made on the west side of appellant's track, forming a new channel on its right of way, where it has since continued to flow. By the flow of its waters through this new channel, it soon began to cut into and undermine the embankment on which appellant's track is located. For the purpose of diverting the waters of this stream back into the old channel, the appellant, during the year 1908, built dams across it, which were washed away. In 1909, by driving down piling, a dam was finally constructed, which stood

for a while and forced the water into the old channel. The gravamen of appellee's suit is that the appellant had no right to construct this dam, and divert the waters back to the old channel; that, if it had such a right, it could not be exercised, unless the appellant first cleaned out the bed of the old channel, which had, since, the creek changed its course, been filled up to some extent by the deposit of sand and gravel, causing the waters, when turned back, to wash and destroy his land. The appellant assigned as error the refusal of the court below to instruct the jury to return a verdict in its favor.

Where a stream has left its accustomed channel, and formed a new channel on the land of an adjoining riparian owner, the latter has the right, by the erection of barriers, to turn the waters of such stream back from the new to the old channel. The maxim, "*Aqua currit et debet currere, ut currere solebat*," applies. The waters of a stream ought to run in its old channel, and no one can justly complain that one who has the right to have them so run makes them run there. *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301; *Pierce v. Kinney*, 59 Barb. (N. Y.) 56; Gould on Waters (3d Ed.), § 204. And the riparian owner, on whose land the new channel is formed, may erect barriers and turn the waters of such stream back from the new to the old channel, without being required first to clean out such old channel, so as to restore it to the depth and condition it was in before the stream changed its course. *Pierce v. Kinney, supra*. The reason is the change in the course of the stream is the fault of neither owner. It is from natural causes. It is true in this case the depressions along appellant's roadbed, made in the construction of its road, in connection with the high waters of the creek, caused the stream to leave its old channel and form a new one. But this was not appellant's fault. By condemnation of or deed to its right of way it acquired the right to make the necessary excavations to build its roadbed, and if in properly con-

structing such roadbed it resulted in the creek leaving its old channel, still appellant had the right to turn it from its new back to its old channel.

It is contended by appellee that he acquired a right, by prescription, to have the creek flow in the new channel; that the excavations which, in connection with the overflow, caused the new channel, were made more than twenty years before the bringing of this suit. There is no foundation in fact for such contention, for the testimony, without conflict, shows that the creek never left its old channel until the spring of 1908.

Appellee has no cause of action. The court should have directed a verdict for the appellant.

Reversed and remanded.

LENA WHITE ET AL. v. C. V. RATCLIFF, ADMINISTRATOR,
ET AL.

[54 South. 658.]

LIFE INSURANCE. Policy Assignment.

Where the insured shortly after obtaining a policy on his life, payable to his executors, administrators or assigns, pins a certificate to the policy making his father the sole beneficiary, but not intending to assign the policy to his father or change the beneficiary therein, except in such manner as would leave him the full control of the policy, and kept the policy in his own possession, such a certificate being revocable at his pleasure and testamentary in character and not executed with the formalities of a will is void.

APPEAL from the chancery court of Pike county.

HON. J. S. HICKS, Chancellor.

Suit by C. V. Ratcliff, administrator, against Lena White et al. From a decree directing the money in the

insurance policy to be paid to the father of the insured, defendants appeal.

The facts are fully stated in the opinion of the court.

Cassidy & Butler, for appellant.

The question is, was this a valid assignment of the policy or was it an ineffectual attempt to make a will? We contend that there was no valid assignment because there was neither a delivery of the policy or a written instrument. We admit that no particular words are necessary to constitute a valid assignment of a chose in action. Any language or act which makes an appropriation of a fund amounts to an assignment. 2d Ency. Law, 1055. But where there is a note, bond or written obligation there must be a delivery of the instrument or at least a delivery of the separate writing if transferred by writing. 2d Ency. Law, 1055; *Palmer v. Merrill*, 6 Cush. (Mass.) 282; S. C., 52 Am. Dec. 782.

In *Palmer v. Merrill*, *supra*, it was held that the endorsement by the insured upon an insurance policy directing the insurers to pay a portion of the amount due to a third person and the endorsement being notified to the insurer; but the instrument remaining in the hands of the insured did not constitute a valid assignment.

In notes to Am. Dec., vol. 7, 1166, there is collected all the authority wherein this case has been cited and discussed. We have been unable to find but two cases on all fours with the instant case. They are *Coffman v. Leggett*, 107 Va. 418; *Williams v. Chamberlain*, 165 Ill. 210.

We say that the instrument was an ineffectual attempt to make a will.

"Whether a writing intended as a will, may be shown by parol testimony or by such testimony together with the writing." *Prather v. Prather*, 52 So. 449. If the paper is testamentary in character and passes no present interest in the property it may be admitted as a will

and if such is uncertain from an inspection of the paper it may be shown by parol. *Wall v. Wall*, 30 Miss. 96; *Sortar v. Sortar*, 39 Miss. 760.

C. V. Ratcliff, for appellee.

The written change of beneficiary is sufficient. It is at least a suggestion or an order to change, and this is sufficient. See *Spratley v. Hartford Insurance Co.*, Fed. Cas., No. 13256 (1 Dill. 392). It is said there: "An order by the insured directing the insurer to pay the amount of the loss to a certain person makes him an assignee of the cause of action and the real party in interest." Such order or assignment is binding even though it had been by parol. See *Brown v. Mansus*, 64 N. H. 39, 5th Alt. 768. It is said there: "One who has received a certificate of life insurance on his life, payable to his heirs, may assign the same by parol to the mother of his illegitimate child for its support, when the company does not object." See also, *Springfield Fire & Marine Insurance Co. v. Newman*, 17 Minn. 123 (Gill. 98).

An assignment or change of the beneficiary of a life policy need not be in writing even: See *McCauley v. Central National Bank*, 27 S. C. 215, 3 S. E. 193. *In re Babcock*, 12 N. Y. St. Rep. 841; *Meadows Guardian v. Meadows, Administrator*, 13 Ky. Law Rep. 495.

An assignment of a life insurance policy need not be accompanied by an actual delivery thereof. See *Spring v. S. C. Insurance Co.*, 21 U. S. (8 Wheat.) 268, 5 L. Ed. 614.

In the instant case the company knew of the change of beneficiary, and the company's agent wrote it, and the change was to the father. This holding is from a court of high repute.

The policy was assignable of course: See, *Stuart v. Sutliff*, 46 Ann. 240, 14 So. Rep. 912; *Murphy v. Red*,

64 Miss. 614, 1 So. Rep. 761; *Grant v. Independent Order of Sons and Daughters of Jacob, et al.*, 52 Rep. 698.

If the company in this case had declined to pay the death claim under the policy, the assignee, J. F. White could have enforced payment to him on his assignment or change of beneficiary. See *St. John v. The American Mutual Life Insurance Company*, 13 N. Y. (3 Kern.) 31, 64 Am. Dec. 529, affirming 9 N. Y. Sup. Ct. (2 Duer.) 419; also, *Carraher v. Metropolitan Life Insurance Co.*, 11 N. Y. St. Rep. 665.

A change of beneficiary is, in effect, an assignment, and must be so treated. See, 9 L. R. A. 841; especially latter part of opinion and notes.

Bliss on Insurance, No. 333; May on Insurance, No. 388 and 396, and authorities there cited.

We submit that the question of intent and purpose of Yancey E. White, were fairly and distinctly submitted to the chancellor, and guided by the assignment and the testimony, which was abundant in this regard, and without contradiction, the chancellor correctly decided that the assignment or change of beneficiary was sufficient under the law, to direct the payment of the proceeds of the policy to be made to J. F. White, beneficiary, and that the decree should be affirmed.

SMITH, J., delivered the opinion of the court.

Prior to his marriage, Mr. Yancey E. White obtained from the Union Central Life Insurance Company a policy upon his life, payable in the event of his death to his executors, administrators, or assigns. When the policy was delivered, or shortly thereafter, White stated to the agent of the company that in the event he should die without having married he wanted his father to receive the benefit of the policy, but in the event of his marriage he desired his wife to have the benefit thereof. The agent then wrote the following memorandum, which was signed by White and then pinned to the policy:

“McComb City, Miss., Oct. 1, 1902.

“This is to certify that I, Yancey E. White, have this day made my father, J. E. White, the sole beneficiary of the policy in the event of my death by accident or otherwise. Witness my hand this the day of October, 1902.

his

“Yancey X E. White.”

mark

When this was done, White understood, according to the agent of the company, that he could take this memorandum out of the policy at any time he desired, and in that event the policy would be payable to his executors, etc., as written in the face thereof. One of White's brothers testified that he was present when this policy was delivered, and that it was understood that White had willed to his father, “unless he taken a notion to change it.” After receiving the policy, White showed it to his father, together with the memorandum attached thereto, and said to him: “See here what I have done. None of the rest of the boys in the family have done this much for you . * * * If you outlive me, you will get it.” His father then told him to put it away. White, who at this time was living with his father, put the policy in his trunk, and afterwards, when he left his father's house and established a home of his own, carried the policy with him. The policy, with the memorandum pinned to it, remained in his trunk until death. In the meantime White married, and at his death left surviving him a widow and two children. White paid no premiums on this policy after his marriage, and seems to have been under the impression that it had thereby lapsed. The policy was in fact still in force, by reason of an extended insurance clause contained therein, and after White's death was by the company paid to his administrator. White's father claims to be the beneficiary of this policy, and this proceeding was instituted

in order to ascertain whether the money in the hands of the administrator should be paid to his father or to his widow and children. From a decree directing that the money be paid to the father, this appeal is taken.

It is manifest that White never intended to assign this policy to his father, and it is equally manifest that he did not intend to change the beneficiary therein, except in such manner as would leave him in full control of the situation. In order to do this, he executed an instrument, revocable at his pleasure, by which he directed what disposition should be made of the policy after his death. Such an instrument is testamentary in character, and, to be valid, must be executed with all the formalities attending the execution of a will. This instrument, not having been so executed, is void.

Reversed and remanded.

MUTUAL BENEFIT LIFE INSURANCE CO. v. ROBERTA
WILLOUGHBY.

[54 South. 834.]

1. LIFE INSURANCE. *Disposition of policy. Beneficiary. Consent.*

The right of the beneficiary named in a life insurance policy to the proceeds of the policy is absolute, that is to say, the rights to the benefits under the policy during the life of the contract, cannot be destroyed by the insured or disposed of, except with the consent of the beneficiary, and this applies whether the policy be an ordinary life policy or a policy to which is attached a loan value, cash surrender value and automatic paid up insurance.

2. SAME.

Where the husband of the beneficiary in a policy procures a loan on the policy without the beneficiary's knowledge or consent and without ratification on her part, he is not her agent and she is not estopped by his acts.

APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Suit by Mrs. Roberta Willoughby against the Mutual Benefit Life Insurance Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Cochran & McCants, for appellant.

A life insurance policy is a mere chose in action, and may be pledged, transferred or assigned just as any other chose in action.

In *Lanier, Admr. v. Box, Admr.*, 64 L. R. A. 458, the terms of the policy were identical with the terms of the policy before the court, and the court said in that case, "we think upon the authorities, there can be no doubt of the absolute control of the insured over this policy to the extent, at least, of the contingent interest which he had in it, and that an assignment made by him or a disposition of it by his will would convey to his assignee or his legatee whatever interest might accrue to him from this policy."

In *Heer v. Reinoehl*, 58 Atl. Rep. 862, an assignment of the contingent interest of the wife, on a policy of insurance on the life of the husband before his death was held to be valid and binding on the wife.

If the insured had a right to pledge or assign his interest in the policy, then the result and conclusion is inescapable that he had a right to borrow money on it from appellant, even though the contingent interest of the appellee in the policy was thereby defeated. *Union Central Life Ins. Co. v. Wood*, 37 N. E. Rep. 180; *Taylor v. New York Life Ins. Co.*, 90 N. E. Rep. 968; *Omaha Nat. Bank v. Mutual Life Ins. Co.*, 84 Fed. Rep. 122; *Tate v. Mutual Benefit Life Ins. Co.*, 42 S. E. Rep. 892.

In procuring the policy to be issued and paying the premiums, the insured acted as the agent of the appellee

for whatever interest she had in the policy, and she is bound by his acts and representations made within the scope of his authority. *Bradstreet Co. v. Robert Gill*, 2 L. R. A. 405; *Sarah G. M. Miles v. Conn. Mut. Life Ins. Co.*, 37 U. S. Rep., Lawy. Ed., p. 128.

Counsel for appellee seem to misconceive the authorities which they cite from this court. What was said by the court in *Johnson v. Bacon*, 92 Miss. 156, was said of and about an ordinary life policy, and has no sort of application to the instant case. That authority simply states the general rule applicable to the class of contracts involved in that case.

We believe John Marshall said that the authority of every case ceased with the facts of that particular case.

Counsel say in their brief that the case of the *Bank v. Williams*, 77 Miss. 398, "is on all-fours with the case at bar" and seem to be just a little impatient with us, because we do not admit that that authority settles the whole controversy. Again we say that in our opinion counsel misconceive that authority. We insist that the *Williams* case does not apply to the contract involved in the case at bar. The policy in the *Williams* case was an ordinary life policy, pure and simple. The incorporation in the policy of the provision that if the wife predeceased the insured that the policy would be payable to the insured's legal representatives in no wise affected the legal character of the contract, and is without legal significance.

If the wife had died before her husband, her interest in the policy would have terminated, and the policy would have become payable to the husband's legal representative by operation of law. *Tompkins v. Levy*, 87 Ala. 263.

Williams was compelled to pay the premiums until he died in order to keep the policy in force, and in no event could he receive any benefit from the policy. The policy, therefore, was an ordinary life policy, and that char-

acter of policy was in the mind of the court when it wrote the opinion in the Williams case.

We think the statute quoted in the opinion settles it, that the possession of the policy by the wife was not necessary in order to enable her to acquire a vested interest in the policy, but it seems to us that it could have no other application to the case, because the statute, and the policy under the general rules applicable to ordinary life policies, accomplish the same result, so far as the indefeasible interest of the wife in the policy was concerned.

The statute could not apply to the policy under consideration except on the question of exemption, because it designates two beneficiaries.

The policy in the instant case was a twenty-year limit payment, and was payable to appellee in case she survived the insured, otherwise to the insured, his executors, administrators or assigns.

The probabilities were just as great that the insured would survive the appellee as they were that appellee would survive the insured. The insured therefore had as great an interest in the policy as appellee. If the insured had survived appellee, he could have exercised all the domination over the policy that he could have had over any other property.

Counsel make no answer to our argument and the authorities cited to the point that the insured, under the terms of the policy, had a right to borrow money on the policy and that the loans he procured from the appellant must first be deducted before there could be any extended insurance. They do admit, however, that if the loans are to be deducted that the policy was forfeited by the non-payment of the premiums before the death of the insured.

It seems to us that their criticism of the Miles case is altogether unsatisfactory. If that high authority holds anything, it holds that the insured was the agent of

appellee and that appellant had a right to rely on his representations, that he was unable to pay the premiums and that he wanted to surrender the policy. If he was her agent, and he was, according to the highest authority in this country, then he was her agent under the facts of this case, when he surrendered the policy and received its cash surrender value whether the appellee signed the surrender receipt or not.

We respectfully submit that the court erred in refusing a peremptory instruction for appellant.

George B. Power and Willing & Davis, for appellee.

It is a well established principle of insurance law that in ordinary life insurance policies, where no power of disposition is reserved in the insured, the beneficiary in the policy, upon the issuance of the policy, acquires a vested right therein, which cannot be impaired or defeated without his consent. See Elliot on Insurance, 354; Bliss on Insurance, 2d Ed. 517; Cook on Life Insurance, § 74, note; 2d Joyce on Insurance, § 730, 25 Cyc., 778-6, and numerous authorities cited in notes 97 thereunder; *Central Bank v. Hume*, 128 U. S. 195; *Pence, Admr. v. Makepeace*, 65 Ind. 345; *Hendri & Blotfoff M. F. G. Co. v. Platt*, 13 Col. App. 15; *Stigler, Ex'x., v. Stigler*, 77 Va. 163; *Harley v. Heist*, 86 Ind. 196; *Hooker v. Sugg*, 102 N. C. 115; *Griffith v. Insurance Co.*, 101 Cal. 627; *In re Dobbel*, 104, 432; *Garner v. Germania Life Ins. Co.*, 110 N. Y. 266; *Jones v. Patty*, 73 Miss. 179; *Bishop v. Curphy*, 60 Miss. 23; *Cozine v. Crimes*, 76 Miss. 200; *Bank v. Williams*, 77 Miss. 398; *Johnson v. Bacon*, 92 Miss. 156; *Grege v. Grege*, 78 Miss. 443.

In the case of *Bank v. Williams*, 77 Miss., *supra*, which case is on all fours with the case at bar, the court held that life insurance policy designating a beneficiary is the property of the beneficiary the moment of its issuance, whether then delivered to him or not, and the pro-

ducer of a life insurance policy designating another as beneficiary has no power, without the beneficiary's consent to transfer any interest in it to a third party by deed or will.

Counsel for appellant contended in the next place that in procuring the policy to be issued and in paying the premiums, the insured acted as the agent of the appellee for whatever interest she had in the policy, and that she is bound by his acts and representatives made within the apparent scope of his authority. All the authorities are against this proposition; indeed our own court has expressly decided to the contrary in the cases of *Bank v. Williams*, 77 Miss. and *Johnson v. Bacon*, 97 Miss., *supra*.

Counsel cited only one authority in support of this contention, namely, *Sarah C. Miles v. Connecticut Life Insurance Co.*, 37 U. S. Rep., Lawyer's Ed., page 178. The reason the wife failed to recover on the policy in the above cited case was because the husband failed to keep up the premiums.

It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. *Bliss, Life Ins.*, 2d Ed., p. 517; *Glanz v. Gloeckler*, 10 Ill. App. 486, per McAllister, J. S. C., 104 Ill. 573; *Wilburn v. Wilburn*, 83 Ind. 55; *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193; *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419; *Gould v. Emerson*, 99 Mass. 154; *Knickerbocker Life Ins. Co. v. Weitz*, Id., 157.

The case of *Jackson Bank v. Lula B. Williams*, 77 Miss. *supra*, is exactly like the case at bar, and the court held contrary to all the propositions advanced by counsel for appellant. An examination of the record will show that

that case is identical with the policy sued on in the instant case.

MAYES, C. J., delivered the opinion of the court.

An extended discussion of the facts of this case seems unnecessary. In truth, there is very little room for dispute, in the attitude in which this record now comes to us, after the verdict of the jury finding that Mrs. Willoughby did not sign any of the documents leading up to the loan or surrender of the policy. In 1897 Julian H. Willoughby procured a policy of insurance on his life under a twenty-year payment plan, and named as beneficiary therein his wife, Mrs. Roberta Willoughby, in case she survived him, and, if she did not, the policy was then payable to the insured, his executors, administrators, or assigns. The insured died in 1908, and the beneficiary did survive him. In this aspect of the contention in this case, unless the beneficiary has done or acquiesced in something which defeats her rights in the policy as beneficiary, she is entitled to the full benefit of same. There is nothing peculiar in the contract of insurance which is the subject of litigation in this case from other life insurance policies. The contract stipulates that, if the premiums thereon shall be paid twenty years, it then becomes a paid-up policy of insurance, and no further premiums are required to keep it up. The policy has certain provisions in it which provide for its non-forfeiture after two full annual premiums have been paid. It has certain stipulations giving it a loan value and a cash surrender value, and in case of a lapse of the policy after the second annual premium payment the contract provides for an automatic extension of the policy; the length of extension depending upon the number of premiums paid. All the premiums on the policy were paid by the insured until the year 1903. At that date a sufficient amount in premiums had been paid, according to the testimony, to automatically extend the policy until

February, 1914. The insured died on October 12, 1908. It is thus seen that the automatic extension of the insurance carried the policy long past the date of the death of the insured.

The main contention in this case is that the insured procured a loan, in accordance with the terms of the policy, in 1903, of the then loan value of the policy less the premium for the current year. Subsequently the premium for 1904 was paid on the policy, part in cash and the balance by an additional loan on the policy, which was the full loan value of same, and a new certificate of loan was executed, and the original certificate of loan, made in 1903, cancelled and returned. In 1905 the last premium was paid on the policy. On May 12, 1906, the insured wrote to the company that he was financially embarrassed and wanted to surrender the policy, because he was unable to pay the premiums. Accordingly, some time during the year 1906, the insurance company sent a check to the beneficiary and the insured of the then full cash surrender value of the policy of sixty-two dollars and twenty-eight cents and canceled the policy. All the applications for the loan on the policy were required by the company to be signed by the beneficiary and the insured—that is to say, Mrs. Willoughby and her husband—and were apparently so signed. When the checks were sent to cover the amount of the loan, they were made payable to the insured and the beneficiary, and both their names appear to have been indorsed on the check when it was collected at the bank. When the application was made for the cash surrender value, and the surrender receipt signed, it was required to be signed, and was apparently signed, by the husband and the wife, and the check made payable to the husband and wife, and when collected from the bank they both apparently indorsed it. Mrs. Willoughby, the beneficiary, denies that she knew anything about the negotiations of the loans on the policy, or of the application for the sur-

render of the policy, or the collection of any of the money paid on the loans or sent by the insurance company as a surrender value on the policy, and denies that she signed the checks with her husband, or any of the applications for loans, or the surrender receipt, or that she knew anything about it, or received any benefit in any way from any of the money so received. In short, her testimony is that all these signatures which purport to be of her name were made by the husband without her knowledge, acquiescence, or consent. These facts were submitted to the jury, and they have found as facts that Mrs. Willoughby knew nothing about these negotiations, did not consent, and did not sign the checks, or receive any of the money. We must therefore assume that, although Mrs. Willoughby was the beneficiary in the policy, Mr. Willoughby, the insured, undertook to collect and dispose of the benefits of the policy without her consent.

We held in the case of *Johnson v. Bacon*, 92 Miss. 156, at page 163, 45 South. 858; "Where a life insurance policy is taken out for the benefit of named beneficiaries, it vests in the beneficiaries the absolute ownership, and it cannot be assigned, transferred, deposited as collateral security, or made in any way liable for the debts of the insured without the consent of the beneficiary expressly given. If there be any attempt to assign, transfer, or in any way dispose of the proceeds of the policy by the insured, or any attempt to make same liable for his debts, and it is done without the consent and authority of the beneficiary expressly given, it is as void as if the insured undertook to dispose of property belonging to an entire stranger; and this is true, whether the premiums are paid by a solvent or insolvent insurer. *Jones v. Patty*, 73 Miss. 179, 18 South. 794; *Bishop v. Curphey*, 60 Miss. 23; *Cozine v. Grimes*, 76 Miss. 300, 24 South. 197; *Central Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *Pence, Admr., v. Makepeace*, 65 Ind. 345;

Hendrie & Blotfoss Mfg. Co. v. Platt, 13 Colo. App. 15, 56 Pac. 209; *Stigler's Ex'x v. Stigler*, 77 Va. 163; *Bank v. Williams*, 77 Miss. 398, 26 South. 965." And in *Bank v. Williams*, 77 Miss. 398, 26 South. 965: "Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance, and who continues to pay the premiums, has no authority, by will or deed, to change the designation or title to the money. He is under no obligation to continue to pay the premiums, unless he has covenanted so to do; but, if he does so, the person originally designated in the policy will derive the benefit." From the above authorities it is seen that this court has already held that the right of the beneficiary named in an insurance policy to the proceeds of the policy is absolute; that is to say, the right to the benefits under the policy during the life of the contract cannot be destroyed by the insured, or disposed of, except with the consent of the beneficiary. Of course, the party taking out the policy cannot be forced to pay the premiums thereon, and in this way the policy may be destroyed; but so long as the policy has any living force all rights accruing under same and all values belong to the beneficiary.

But counsel for appellant argue that the rule announced by this court in the authorities above quoted has application only to an ordinary life policy, where there are no such incidents attached as loan value, cash surrender values, and automatic paid-up insurance, etc. We are unable to draw any distinction, in principle, whatever may be the nature of the contract, when there is a named beneficiary in the contract of insurance. It may be possible to so draw a contract of insurance as to leave in the insured a right to collect and appropriate the loan, or cash surrender value of a policy; but the contract must be a different contract from the one in this case. The contract of insurance is taken out for the benefit of the named beneficiary in the contract. The

beneficiary gets all the benefits of the contract, and the legal right of the beneficiary is not changed by reason of the fact that the contract gives certain beneficial incidents that may give to the contract of insurance a cash value during the life of the insured, unless the contract is so worded as to reserve the cash value of the policy to the insured in case he chooses to take it. The beneficiary in the policy is in every true sense the owner of the policy, and the insurance company recognizes this by requiring the beneficiary to sign when any loan is made on the policy, or any surrender value paid. The beneficiary may not be the owner of the policy in the sense that the written contract is actually delivered to the beneficiary to be kept in custody; but the beneficiary is entitled to the benefits under the contract, and is in every true sense the owner in law. It is probable that the beneficiary cannot obtain the loan value of the policy without the consent of the insured; it is probable that the surrender value cannot be obtained without the consent of the insured; but if either value is obtained, it belongs to the beneficiary.

Counsel for appellant argue to the court that the principle that, where one or two innocent persons must suffer a loss, the loss must be borne by the one who by conduct, acts, or omissions has made possible the loss; but it is our view that this principle has no application to this case. The argument assumes the existence of facts warranting its application, when the facts do not exist. The fact that Mr. Willoughby was the husband of the beneficiary, and procured the life insurance policy for her benefit, and afterwards, in disregard of her right and without her acquiescence, undertakes to dispose of the policy, certainly creates no estoppel on her part to assert her rights under the policy. If we should hold that, after one has procured a policy of insurance in favor of a named beneficiary and then disregards the rights of the beneficiary and disposes of the proceeds

of the policy, such beneficiary would be estopped from asserting any claim under the policy, the cases of *Bank v. Williams* and *Johnson v. Bacon*, *supra*, and all the law declared by this court on this subject would be nullified. When the husband procured the loan on the policy, under the facts of this case as found by the jury, he had no authority so to do. He was not the agent of his wife, was not acting for her, and, not being her agent for the purpose of negotiating this loan, or cancelling the policy, he had no authority, either real or apparent, and, of course, could not have been acting within the scope of any authority, because he did not have any.

This case is not without its hardships; but, while this is true, the insurance company was bound to protect itself from fraud, and, if it did not, whatever may be the morale of the question involved, the law of the land is with appellee. The hardship on the insurance company is no greater in requiring them to pay the proceeds of the policy than would be the hardship on Mrs. Willoughby, should she be required to lose the benefit of the policy on which she claims to have helped pay the premiums by teaching, because of the misdoing of the husband, of which she had no knowledge and to which she did not consent.

The instructions in this case are free from error, and the case is affirmed.

D. F. VAUGHN v. R. H. HUFF.

[54 South. 837.]

REPLEVIN. Possession of property by defendant. Estoppel.

An action of replevin is not maintainable where the defendant did not have possession of the property at the time of the institution of the suit, and did not execute any forthcoming bond, nor authorize any one else to do so for him, nor ratify the act of another doing so; there can be no estoppel in such case.

APPEAL from the circuit court of Pike county.

HON. W. H. WILKINSON, Judge.

Replevin by R. H. Huff against D. F. Vaughn et al.
From a judgment for plaintiff, defendant appeals.

The facts are stated in the opinion of the court.

E. J. Simmons, for appellant.

Notwithstanding the fact that all the evidence in the case shows that D. F. Vaughn did not in fact execute the forthcoming bond, and notwithstanding the fact that W. B. Vaughn, trustee, did execute the bond, and notwithstanding the fact that the evidence plainly shows that D. F. Vaughn did not have the possession, but that the property was actually in the possession of the trustee, still upon coming in of the verdict the court entered a judgment against the defendant and the sureties on said bond for the forthcoming of the property, and this, I submit, was error, such judgment not being warranted by the proof and not being proper in any view of the case. It is inconceivable that the court would hold that Huff is entitled to have the property returned to him and that W. W. Vaughn would be forced to institute a replevin suit in order to execute the trust. The record simply leaves W. B. Vaughn free to foreclose the trust deed by a sale

of the property and it, in default of the property, leaves plaintiff, Huff, the right to demand of the beneficiary, and the gentlemen who signed as sureties on a forthcoming bond, the value thereof. In other words, if by a foreclosure of the trust deed and a sale of the property by the trustee, D. F. Vaughn should succeed in collecting his debt, he must, under the judgment rendered herein, not only hand over the same to the plaintiff, but in addition the actual value of the property as found by the jury. To state the case is to demonstrate that reversible error has been committed.

R. W. Cutrer, for appellee.

The judgment entered against D. F. Vaughn and the sureties on his bond, S. Cohn & Sons and J. A. Wiltshire, we submit, was proper.

These sureties signed the bond for D. F. Vaughn and not for W. B. Vaughn, and as the jury found that D. F. Vaughn was in the possession of the property, the judgment was correctly entered against himself and the sureties on his forthcoming bond, who were S. Cohn & Sons and J. A. Wiltshire.

We therefore confidently submit that the verdict of the jury and the judgment of the court below was correct and the case should be affirmed.

ANDERSON, J., delivered the opinion of the court.

This is an action of replevin by the appellee, R. H. Huff, against the appellant, D. F. Vaughn, and his son, W. B. Vaughn, which was dismissed by the court below as to the latter. A judgment was rendered in favor of appellee against the appellant for the possession of the property involved, from which appellant prosecutes this appeal.

The appellee, for the purpose of securing an indebtedness due by him to the appellant, executed a deed of trust on the property involved to W. B. Vaughn, as trus-

tee. At the instance of the appellant, the trustee took possession of the property for the purpose of sale under the deed of trust to satisfy the indebtedness thereby secured, and had advertised the same for sale when the appellee instituted this action of replevin in the circuit court against the appellant and the trustee to recover the property. When the writ of replevin was levied, the trustee, desiring to retain possession of the property, and conceiving that the forthcoming bond should be executed by the appellant, without authority of the latter, executed such bond, signing appellant's name as principal, which was accepted by the officer levying the writ, and the property left in the hands of the trustee. A few days before the trial of the case, the trustee, for the purpose of making the forthcoming bond his bond, instead of that of the appellant, signed his name to it as principal. Both the affidavit and writ of replevin were against appellant and the trustee, but the declaration was filed against the appellant alone. The appellant pleaded the general issue, and gave notice thereunder he would insist at the trial that the trustee should be joined as his codefendant in the declaration. On motion of the appellee the cause was dismissed as to the trustee, to which action of the court the appellant excepted. The trial then proceeded against the appellant, resulting in a judgment against him and the sureties on the forthcoming bond.

The appellant moved the court for a peremptory instruction in his favor, which was denied. This instruction should have been given. There was no issue of fact as to the possession of the property for the jury to try. Without any conflict whatever, the evidence shows that, at the time of the institution of the suit and the levy of the writ, the trustee, W. B. Vaughn, had possession of the property, and not the appellant. Nor is there any conflict in the evidence as to whether the forthcoming bond was executed by the appellant. The trustee, W. B.

99 Miss.]

Statement of the case.

Vaughn, signed appellant's name to the bond as principal, without his knowledge or consent. Under the authority of *Furst v. Pease*, 52 South. 257, if the appellant had executed the forthcoming bond, he would be estopped to deny that he had possession of the property. But he is not estopped, because he did not execute it, nor authorize the trustee to execute it for him, nor afterwards ratify the act of the latter in so doing.

Reversed and remanded.

A. C. SEAVEY AND SONS v. J. I. GODBOLD.

[54 South. 838.]

1. LANDLORD AND TENANT. *Rent and supplies. Estoppel. Agent.*

Where a tenant sells cotton raised on the leased premises with the landlord's consent and the purchaser pays part of the proceeds to the landlord for his rent and the balance to the tenant and the landlord fails to disclose to the purchaser when he is paid the rent that he has also a claim for supplies, he is estopped from afterwards asserting his claim for supplies against the purchaser.

2. SAME.

In such case the tenant is the agent of the landlord to make the sale of the cotton and if he fails to account for the proceeds of the sale the purchaser cannot be made to suffer on account thereof.

APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Suit by J. I. Godbold against A. C. Seavey and Sons et al. From a judgment for plaintiff defendant appeals.

The facts as shown by the record are: That one Joe Keene rented land from appellee, Godbold, for the sum of one hundred dollars. It seems that he brought four bales of cotton to market, two of which were claimed to

have been raised by his son, Luther Keene, on the land rented from appellee. The Keenes, Joe and Luther, met Godbold in the city of Brookhaven, in compliance with a letter written by Godbold to Joe Keene, and brought the cotton with them. With Godbold's consent, the Keenes took samples of the cotton to several merchants, and finally sold same to appellants. Appellants paid Luther Keene for two bales, and at Joe Keene's instance paid appellee one hundred dollars for the rent. At the time of the settlement, appellee made no demand for the cotton sold by Luther Keene, nor did he assert any claim to it because of any lien. It appears from the record that Godbold had advanced certain supplies to Joe Keene, amounting to eighty-four dollars and ninety-five cents, which amount he demanded of Luther Keene out of the proceeds of the sale of his cotton, and, being refused, instituted suit against Joe Keene and the Seaveys. There was a judgment in favor of the appellee against appellants and Keene, from which this appeal is taken. At the time the cotton was sold to appellants, no notice was given appellants that appellee claimed a lien for supplies on the two bales claimed as the cotton of Luther Keene and for which appellants paid Luther Keene. It is the contention here of appellants that the actions of Godbold amounted to a waiver of any lien thereon, since they permitted the Keenes to market the cotton and receive payment therefor without objection.

A. C. & G. W. McNair, for appellants.

It will be noted especially that Godbold, the landlord, permitted both Luther and Joe Keene to make the sales of all the cotton on which he claimed a lien, and knew that Joe and Luther Keene were operating together and that they were selling together; still, when the settlement was made with Seavey & Sons, and Joe Keene in Godbold's presence, when he, Godbold, received from Seavey & Sons one hundred dollars, Godbold remained

silent and did not call Seavey's attention to any other claim he had on the cotton. We say that that was the time for him to speak, and failing to do so, he cannot now be heard to complain. His conduct on that occasion was misleading and he is estopped by it. We submit that the cases of *Cohn v. Smith*, 64 Miss. 816 and *McCormick v. Blum*, 75 Miss. 81 are decisive of this case in appellant's favor. When Mr. Godbold stood by and allowed Joe and Luther Keene to sell the Cotton as their own without disclosing his lien to Seavey & Sons, he cannot afterwards recover from Seavey & Sons the cotton or its proceeds. *Thompson v. Blanchard*, 4 N. Y. 303; *Brooks v. Record*, 47 Ill. 30.

C. V. Ratcliff, for appellee.

Counsel says something about Seavey & Sons purchasing without notice. This fact does not affect the right of the landlord to recover. See *Eason v. Johnson*, 69 Miss. 371; *Warren v. Jones*, 70 Miss. 202; *Ball v. Sledge*, 82 Miss. 749, and many others. This doctrine is too well settled to cite authority.

Did the plaintiff waive his lien as a landlord? This issue was clearly and properly submitted to the jury and they found that the plaintiff did not waive his lien, and brought a verdict for him for the sum due for supplies. Counsel refers to the clause in appellee's testimony, where he said, "if consenting for him, Keene, to try the market that day and find a sale of it, waives it, I waived it." Counsel ought to have followed up the testimony. The next question is, "Then you did not waive it?" His answer is, "No, sir, I did not." Counsel contends that his conduct waived it. He cites 64 Miss. 816; 75 Miss. 81. These cases are not in point at all in the instant case.

MAYES, C. J., delivered the opinion of the court.

Under the facts of this case, Mr. Godbold has no right to a judgment against appellants. What Godbold did amounted to a virtual appointment of the Keenes as his agents to make a sale of the cotton on which he had a landlord's lien, and if they failed to carry out the trust thus reposed in them, and make due return of the proceeds, innocent parties cannot be made to suffer on account thereof. Mr. Godbold testifies for himself, and is much to be commended for his frankness; but, taking his own testimony, it conclusively shows that he is estopped to deny that the Keenes had authority to dispose of the cotton in question. *Reversed and remanded.*

HUGH BRANTON v. B. B. BUCKLEY ET AL.

[54 South. 850.]

1. *WILLS. Remainder. When vested.*

A devise of a remainder over after the death of the life tenant, to testators, brothers and sisters, being a gift to a number of persons not individually named, but all answering a general description, is a gift to them as a class.

2. *SAME.*

Generally, in the absence of a contrary intent, the persons constituting such a class are to be ascertained at the period of distribution and the application of this rule depends upon the time when the estate vested in the members of the class. If no interest vested until the termination of the life estate, then only those members of the class in being at that time, can share in the distribution.

3. *VESTING OF ESTATES. Ascertainment.*

The law favors the vesting of estates at the earliest moment, and, generally, where a contrary intent does not appear, devises to a class vest, immediately upon the death of the testator in members of

the class then in being, subject to open and let in members thereof, who may afterwards come into existence before the date fixed for the ascertainment of the members of the class.

4. WILLS. Vested estate. Ascertainment of members.

Where the devise to a class vests immediately upon the death of the testator, it is attended by all the incidents of a vested estate, and consequently the shares of all members of the class in existence at that time, but dying before the period fixed for the ascertainment of the members thereof, do not lapse, but devolve upon their appropriate representatives.

APPEAL from the chancery court of Jefferson Davis county.

HON. G. G. LYELL, Chancellor.

Suit by Hugh Branton et al. against B. B. Buckley et al. From a decree dismissing the bill, complainants appeal.

The facts are fully stated in the opinion of the court.

Mounger & Mounger, for appellants.

We submit that the question to be determined by this court is the same as that we have stated was determined by the chancellor in deciding the demurrer in this case. It is this: Whether the direction of the will to the effect "after her (the testator's widow) death, that is to be divided share and share alike to my brothers and sisters," meant all the brothers and sisters of deceased, or whether it meant only those living at the time of the termination of the life estate.

Our contention is that the testator gave a life estate to his wife with remainder to his brothers and sisters, meaning thereby, those living at the time of his, the testator's, death. We think that this position is supported both by reason and by the authorities.

In volume 24 at page 382 of the American and English Encyclopedia of Law, under section "C" subsection "2" under the title "Remainders to Class," we find the following language:

"The general rule is that in the absence of a contrary intent, a remainder limited to a class vests in such of the objects as are *in esse*, and answer the description at the death of the testator or the delivery of the deed, subject to open and let in any that may be afterwards born before the determination of the particular estate," etc., and in the latter part of the same paragraph at the top of page 383 the paragraph is concluded with this language:

"The will, however, may disclose an intent not to give a vested interest. This is effected by words of contingency as to the persons who shall take, e. g., a devise to A, remainder to his children living at the time of his death."

Volume 73 American State Reports, beginning at page 413.

Survivorship in a class is usually construed with reference to the death of the testator, so as to give the representatives of such of the class as die after the testator the right to share in the devise or bequest to the class: *Mowatt v. Carow*, 7 page 328, 32 Am. Dec. 641.

"Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the persons living at the death of the testator, but all who may subsequently come into existence before the period of distribution. This rule is also firmly established and universally recognized. It is only in the application of the rule that any difficulty arises."

"It is the policy of the law that estate should vest at the earliest possible moment, and no remainder will be construed contingent which may, consistently with the intention, be deemed vested: *Hovey v. Nellis*, 98 Mich. 374.

Ducker v. Durnham (Ill.), reported in 37 American State Reports at p. 135; *Rudolph v. Rudolph* (Ill.), re-

ported in 99 American State Reports, at page 211, 6 Wall. 458, 481; *Doe v. Perryn*, 3 T. R. 495.

We therefore submit and insist as follows:

That since the persons to take under the will were in being, were ascertained and certain, and were to take absolutely upon the death of the widow, and this was an event which must unavoidably happen by the efflux of time, the brothers and sisters in being at the time of the death of the testator, had a fixed right of property and the period of enjoyment only was deferred and uncertain. This interest was a vested interest and was therefore transmissible.

Cassidy & Butler, for appellee.

Appellants contend that under the will the widow had a life estate and that the brothers and sisters of the testator took a vested remainder and that the class must be determined as of the date of the death of the testator, and therefore the heirs of Emily Farrell take one part. The question discussed by counsel for appellant with reference to the construction of the will cannot be reached as we will endeavor to show.

The rule is that this court will assume in the absence of an affirmative showing to the contrary, by the record, that the decree of the lower court on the merits was correct and was based upon competent and sufficient testimony, and if the decree on the final hearing was correct, it is wholly immaterial whether the demurrer was rightfully sustained, for these two defendants must stand or fall by whatever title appellee has or had.

Should the court be of the opinion, however, that this case as it now stands necessarily presents the question of the construction of the will then in that case we say the decree of the court follows the clear intent of the testator.

It was the belief of the chancellor that the testator intended for his sisters and brothers living at the time

of his widow's death should take the property, and this construction was reached by construing the will and the will alone together with the circumstances surrounding the testator at the time. There is here no claim that the testator could not so provide if he so desired. To the contrary, the case cited by the appellant all hold that such is the law.

"Survivorship in a class is usually (but not always) construed with reference to the death of the testator so as to give the representatives of such of the class as die after the testator the right to a share of the devise or bequest to the class" citing *Mowatt v. Carow*, p. 328, 32 Am. Dec. 641, if the gift is immediate this is necessarily so, if the gift is contingent survivorship, is reckoned from the happening of the contingency." So that if the testator intended for the brothers and sisters living at the death of the widow to take he could so provide.

Hovey v. Netles, 98 Mich. 374; *Mowatt v. Carow*, 32 Am. Dec. p. 646; *Doe v. Brabant*, 4 T. R. 709.

J. C. Carlton, for appellee.

We take it, that it will not be disputed, that the devise, insofar as the "brothers and sisters" were or are concerned, was a devise to a class, which has been defined to be, "a gift to a number of persons not named, who are included and comprehended under the same general description, and who bear a certain relation to the testator, 30, 2nd Ed. A. & E. Enc. L. p. 718. .

On the same page it is said: "If the gift is to a class, and one or more die before the period of distribution, the survivors only take their original shares." Where the legacy or devise to a class is not to take effect in point of enjoyment at the death of the testator, but at a subsequent time, all those who are embraced in the class at such subsequent time will be included." Citing the following cases:

Jones' Appeal, 48 Conn. 60; *Bellfield v. Booth*, 63 Conn. 299; *Mitchell v. Mitchell*, 73 Conn. 303; *Hall v. Hall*, 123 Mass. 124; *McLean v. Howald*, 120 Mich. 274; *Thomas v. Thomas*, 149 Mo. 426; *Cross' Estate*, 10 Pa. St. 360; *Hunt's Estate*, 133 Pa. St. 260; *Denlinger's Estate*, 170 Pa. 104; *Gurber's Estate*, 196 Pa. St. 366; *Tingley v. Harris*, 20 R. I. 517; *Myers v. Myers*, 2 McCord Eq. 256. S. C., 16 Am. Dec. 648; *Waddell v. Waddell*, 47 S. E. Rep. 375; *Cheatham v. Gower*, 94 Va. 383; *Re Williams*, 5 Ont. L. Rep. 345.

In the case of *Crawley v. Hendrick et al.*, vol. 2, A. & E. Annotated cases, and especially in the note thereunder, the question here involved is discussed at some length. It is in the note referred to that we find this language:

"The rule is well settled that where a bequest is made to a class of persons subject to fluctuation by increase or diminution of its number in consequence of future births or deaths; and the time of payment or distribution of the fund is fixed at subsequent periods, or on the happening of a future event; the entire interest vests in such persons only as at that time fall within the description constituting such class. As if property be given simply to the children, or to the brothers or sisters of A, equally to be divided between them, the entire subject of gift, will vest in any one child, brother or sister, or any larger number of these objects surviving at the period of distribution, without regard to previous deaths. Members of the class antedecedantly dying are not actual objects of the gift."

In support of this, and other like statements in this note, the following cases are cited:

Satterfield v. Mays, 11 Hump. (Tenn.) 58; *Re Ibberson*, 88 L. T. N. S. 461; *Roundtree v. Roundtree*, 26 S. C. 450; *Swinter v. Legaire*, 2 McCord Eq. S. C. 440; *Webber v. Jones*, 94 Me. 429; *Demell v. Reed*, 71 Md. 175; *Mercer v. Hopkins*, 88 Md. 292; *Denny v. Allen*, 1 Pick.

Mass. 147; *Campbell v. Stokes*, 142 N. Y. No. 23; *Bisson v. West*, 143 N. Y. 125; *Cox v. Weisner*, 43 N. Y. App. Div. 591; 167 N. Y. 579; *Schwenecke v. Haffner* (Sup. Ct. Spec. T.) 22 Misc. N. Y. 293; *Re Baer*, 147 N. Y. 243; *Echart v. Wulklow*, 26 Misc. N. Y. 249; *Tingley v. Harris*, 20 R. I. 517; *Cole v. Greyon*, 1 Hill Eq. S. C. 311; *Bradley v. Richardson*, 62 S. C. 494; *Carnell v. McKenna*, 2 Shan. Tenn. 190; *Nichols v. Gurthy*, 109 Tenn. 535; *Nodine v. Greenfield*, 7 Paige N. Y. 544; *Thran v. Herzog*, 12 Pa. Supt. 551.

SMITH, J., delivered the opinion of the court.

Appellants, the heirs at law of Emily B. Ferrell, deceased, formerly Emily B. Wylie, filed their bill in the court below to establish their claim to an interest in, and praying for a partition of, certain land. From a decree dismissing the bill, this appeal is taken.

The land in controversy was devised by William M. Wylie to his wife for life, with remainder to his brothers and sisters; the language of his will being as follows: "To my beloved wife, I give, bequeath, and devise one-half of my real estate, to-wit: [Here describing same], and all the appurtenances situated thereon. And that she have, hold and enjoy the products and privileges of the above described lands during her natural life. And after her death that it be divided, share and share alike to my brothers and sisters."

(1) Mrs. Wylie is now dead. Appellant's ancestor, Mrs. Ferrell, was living at the death of her brother, William N. Wylie, but died prior to the death of Mrs. Wylie. This remainder over after the death of the life tenant, devised by Mr. Wylie to his brothers and sisters, being a gift to a number of persons not individually named, but all answering a general description, is a gift to them as a class.

(2) Generally, in the absence of a contrary intent, the persons constituting such a class are to be ascertained

at the period of distribution—in the case at bar, the death of the life tenant. In the will now under consideration, no such contrary intent appears. Whether appellants are entitled to a share in this estate depends upon the time when the estate vested in the members of the class. If no interest vested until the termination of the life estate, then only those members of the class in being at that time can share in the distribution.

(3) The law favors the vesting of estates at the earliest moment, and generally, where a contrary intent does not appear, devises of the character now under consideration vest immediately upon the death of the testator in the members of the class then in being, subject to open and let in members thereof who may afterwards come into existence before the date fixed for the ascertainment of the members of the class. As stated by the editor of American State Reports, in note to *Thomas v. Thomas*, 73 Am. St. Rep. 413: "It must be admitted that the cases are somewhat confusing on this point, failing to discriminate between a devise which vests immediately, the enjoyment of which only is postponed, and a devise which is contingent, because both the vesting in interest and enjoyment are postponed."

(4) Where the devise to a class vests immediately upon the death of the testator, it is attended by all of the incidents of a vested estate, and consequently the shares of all members of the class in existence at that time, but dying before the period fixed for the ascertainment of the members thereof, do not lapse, but devolve upon their appropriate representatives.

The foregoing views are supported by many authorities, most of which will be found collated in 2 Jarman on Wills (6th Ed.), 1667, 1668, 24 A. and E. Encyc. Law (2d Ed.), 382, 383, and note to *Thomas v. Thomas*, 73 Am. St. Rep. 405. The only one of our decisions bearing upon the matter which has come under our observation is *Nichols*

v. *Denny*, 37 Miss. 39, in which only one feature of the rule above announced was under consideration.

Quite a number of cases are cited in the brief of counsel for appellees as supporting their contention, but an examination of most of them discloses that they are not in point, for the reason that the courts reached their conclusions by the aid of special features contained in the particular wills under consideration.

The judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

MISSISSIPPI CENTRAL RAILROAD COMPANY v. MRS. MATTIE HOLDEN.

[54 South. 851.]

1. CONSTRUCTION OF RAILROAD. *Independent contractor. Abutting owner. Damages. Pleading.*

Where a railroad is constructed by an independent contractor according to plans and specifications furnished by the chief engineer of the railroad, and injury results not from negligence in the doing of the work by the independent contractor, but from the doing of the work at all, as illegal or as constituting, when done, a nuisance, the railroad company is liable for damages.

2. SAME. *Amount.*

Where the suit by the abutting property owner was for five thousand dollars damages for injuries to his property by the construction of the railroad, and there was evidence that the property before such construction was worth twenty-five hundred dollars and that the property was greatly damaged in respect to ingress and egress to and from the property and by reason of cinders, smoke and vibrations, a verdict for three hundred dollars is not excessive.

3. PLEADING. *Construction of railroad. Damages.*

Where an abutting owner sues a railroad company for damages and charges in his declaration that his damages were caused by the

construction of the railroad by an independent contractor who had contracted with the railroad to construct such road according to plans and specifications of the chief engineer of the railroad company and that when completed the contractor turned the railroad over to defendant and the same was accepted by it. A special plea, that defendant was not responsible because, at the time of the injury, it had nothing to do with the railroad so constructed, the work having been done by an independent contractor and that the railroad company did not acquire the line until after the damage had been completed, was demurrable, because such plea does not deny the allegations of the declaration that the construction company was to construct the road according to the plans and specifications furnished it by the chief engineer of the defendant railroad company, nor allege that it was the way the construction company performed its work and not the performance of the work itself, which caused the injury.

APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Suit by Mattie Holden against the Mississippi Central Railroad Company. From a judgment for plaintiff, defendant appeals.

This is an action for damages brought by the appellee against appellant railroad company for injury to appellee's property by obstructing the ingress and egress to and from said property by the construction of a line of railway along a certain street in the city of Brookhaven, known as Flora street. The declaration alleges and the proof shows that the appellant's predecessor contracted with a construction company, a foreign corporation, for the construction of its line of railway along such routes as might be selected and designated by the chief engineer of the railway company, and according to the plans and specifications prepared by said engineer and that the work was done in accordance with the contract, and, when completed, the railroad was turned over to the appellant's predecessor. There was a special plea, interposed by the appellant, the defendant below, which set up as a defense the fact that it was not responsible nor liable for the damage to plaintiff, because

at the time the injury was committed, it had nothing to do with the railroad, nor its operation or construction, but that the work was being done by the construction company under contract, and that there was no unity of interest between the two companies, and that the railroad company did not acquire the control of the line of railway until after the damage complained of had been committed. The court sustained a demurrer to this plea, and the case proceeded to trial, resulting in a verdict for the plaintiff for the sum of three hundred dollars, and from a judgment for that amount this appeal is prosecuted.

Jeff Truly, for appellant.

The demurrer admitted the facts as pleaded and simply challenged the legal sufficiency of the admitted facts. This demurrer was sustained. The legal effect of this ruling by the trial court was to overturn the rule of the "independent contract doctrine" in the state of Mississippi. Was he correct in so ruling, Is it the law in Mississippi that a railroad company is responsible that the doctrine of non-liability for the acts of independent contractors has always received recognition at the hands of the supreme court of our state, as well as the courts of final jurisdiction in all other states of the Union. This question has not been presented with any great frequency in the jurisprudence of the state of Mississippi, but in every case where it was even indirectly involved, the non-liability of railway companies for the acts of its independent contractors has been given full force. The first case bearing upon this question in our state, to which our attention has been directed, is that of *N. O. & N. E. R. R. v. Reese*, 61 Miss. 581. That case decided positively that "A railroad company is not responsible for the wrongful act of a contractor in taking trees from the land of another in procuring material to be furnished under his contract."

The language of the court, speaking through Campbell, C. J., was even stronger in behalf of our present contention than the language of the syllabus above quoted: Says the court: "If he has a contractor engaged in his own business under the contract and pursuing his own methods in procuring the materials he has to furnish, the appellant was not responsible for his acts."

There being no unity of interest between the construction company and the railroad company there could be no joint liability to plaintiffs for any injuries inflicted. This is clearly within the reasoning of the supreme court of our state in the case of *Construction Company v. Heflin*, 88 Miss. 314.

Undoubtedly the rule of the non-liability of railroad companies for the acts of independent contractors has been universally recognized by the courts of all other states, including the Supreme Court of the United States, as well as the standard text-writers, whose views are respected and adhered to: 1 Thompson on Negligence, § 626, p. 671; *McKinley v. Railroad Company*, 40 Mo. App. 449; *Railroad Company v. Corngill*, 24 P. 475; see, also, especially *St. Louis, Ft. S. & W. Ry. Co.*, 33 Am. and Eng. R. R. Cases, 397.

As showing that the same rule is still enforced and adhered to, we beg to call the attention of the court to the exhaustive note to the case of *Richmond v. Sitterding*, 65 L. R. A. 461. See, also, *Railroad Company v. Farver*, 111 Ind. 195.

We submit, therefore, that the ruling of the court in sustaining the demurrer to the special pleas, which presented the defense that the United States Construction Company was an independent contractor, is too manifestly error and so violative of the previous thoroughly established jurisprudence of our state as to absolutely necessitate the reversal of this cause.

Cassedy & Butler, for appellee.

Counsel for the appellant is in the attitude of contending that one may employ another to commit a nuisance on one's property, or so near it as to cause special injury to such person or property and to escape all liability on account thereof, because the one so employed is an independent contractor; or that one may employ another to do an act wrongful in itself and escape all liability from the consequences of the act, if the one so employed is an independent contractor; or that one may employ another to perform certain work which will necessarily result in injury, and escape liability, if the person employed is an independent contractor, or that one may employ another to perform certain work according to plans furnished by his employer or according to methods prescribed by the employer and escape all liability on account thereof, if the person so employed is an independent contractor.

But certainly learned counsel would not seriously press any such contention, especially in view of the decision of this court in the case of *Crisler v. Ott*, 72 Miss. 166.

It may be true that the construction company is liable for the wrong complained of, but that in no way relieves the railroad company from liability. Both railroad company and the construction company may be liable. It is not necessary, in this connection at least to complain of the holding of this court in either the Heflin case or the Reese case, though there is much respectable authority presenting a different view. Those cases have no sort of application to the case now before the court. Here the construction company did the very piece of work it was employed to do, in the manner it was employed to do it, on the right of way claimed by the railroad company, over the protest of the abutting property owner, and the railroad company ratified and approved the act and accepted the benefits accruing under the acts?

It is wholly immaterial whether the plea presented a good defense to the suit. Looking back over a completed record, it is manifest that the railroad company was and is liable, and whatever might have been the correct ruling on the plea, the undisputed and uncontradicted facts make a clear case of liability. This case is settled by the case of *Crisler v. Ott, supra*, and it is really unnecessary to go out of the state to demonstrate the correctness of the verdict in this case. But we desire to call the court's attention to the able, full and exhaustive note to the case of *Thomas v. Harrington*, 65 L. R. A. 742.

It is not necessary to deny the general rule. We may concede it to be as stated by counsel, but it has no application to this case. Thus in the note *supra* it is stated: "It is well settled that the rule as to the non-liability of an employer for the negligence of an independent contractor is 'inapplicable to cases in which the act occasioning the injury is one which the contractor was employed to do.'" And "I am clearly of the opinion that, if the contractor does the thing which he is employed to do, the employer is as responsible for that thing as if he did it himself." And again, "A person who employs a contractor to do a particular act is liable for the injurious acts of the contractor which 'flow out of the fulfillment of the contract,'" And again, "When the contractor is employed to do a particular act, the doing of which produces mischief, the doctrine by which the employer is exempted from liability does not apply." And again, "The rule exempting employers from liability for negligence of independent contractors does not apply where the performance of such contract in the ordinary mode of doing the work necessarily or naturally results in producing the defect or nuisance which caused the injury."

Further citation is not necessary. We call the courts special attention to this note. The act of the railroad

was a nuisance. The city could not authorize such an act, at least in so far as to relieve the company from liability to abutting property owners and this is true whether the fee to the street was in the owner or not.

SMITH, J., delivered the opinion of the court.

The general doctrine with respect to the liability of an independent solvent contractor, and nonliability of a railroad for which said independent contractor constructs a line of railway, is thoroughly well settled and needs no restatement. But there are exceptions to that general rule, as well settled as the rule itself, and one of them is that where the injury results, not from negligence in the doing of the work by the independent contractor, but from the doing of the work at all, as illegal, or as constituting, when done, a nuisance, the railroad company is liable, especially where, as here, the work was contracted to be done, and was done, "according to the plans and specifications prepared and to be prepared by the chief engineer of the railroad company, which plans and specifications were to be furnished to the construction company, and to be attached to and become a part of the contract," to quote the language of the contract itself. For full discussion, see the able note to *Thomas v. Harrington*, 72 N. H. 45, 54 Atl. 285, in 65 L. R. A. 742. That contract further provided that the construction company was to obtain all necessary rights of way, which should "in no case be less than one hundred feet wide, unless otherwise specified in writing by the chief engineer." It further provided that "all ground for stations, switches, yards, turnouts," etc., should be built by the construction company, "as needed and specified by the chief engineer and the plans and specifications." We do not think there can be any doubt on the evidence that the doing of the work which resulted in the injury was the doing of work constituting a nuisance, and that it was the doing of the work at all

which gave the plaintiff a cause of action, and not any negligence merely on the part of the independent contractor, in the manner of doing the work.

We do not feel authorized, in view of all the testimony, in disturbing the amount of the verdict. The suit was for five thousand dollars, and the judgment was for only three hundred dollars. There is testimony that the property was worth two thousand and five hundred dollars before the work was done, and there is very much testimony that it has been materially damaged in respect to ingress and egress to and from the place, and some evidence that there was other damage by reason of cinders, smoke, vibrations, etc., which last kind of damage does not, however, seem to have been much insisted upon.

One of the most earnest contentions, and it has received our careful consideration, is that the demurrer to the special plea was improperly sustained. We do not think the special plea meets the case made by the declaration, the contract being a part of this declaration, in view of the averments in the amended declaration, which we have quoted above. The special plea does not fairly, construed clearly and definitely, deny the allegations of the declaration referred to, to the effect that the construction company was to construct the road according to plans and specifications furnished to the construction company by the chief engineer, etc., as quoted above. In other words, if the plea had been replied to, and the jury had found that plea true, it would have constituted no defense, under the law of the case, as to the exception to the general rule above set out, for the reason that the plea fails to deny the allegations of the declaration which brought the case within the exception and took it out of the general rule.

We do not think, therefore, any error was committed in sustaining the demurrer to the special plea, because it falls short of setting up facts which prevented the application of the exception stated to the general rule.

Non constat but that the railroad company would be liable, even if all the things set up in the special plea were true, when the declaration is looked at in the light of all its averments.

We have examined all the assignments of error, and we do not think any reversible error is presented for our consideration. *Affirmed.*

VICKSBURG WATER WORKS CO. ET AL. v. MAYOR AND
ALDERMEN OF CITY OF VICKSBURG.

[54 South. 852.]

1. MUNICIPAL CORPORATIONS. *Special counsel. Injunction. Damages.*

A city or county may make a valid contract to employ associate counsel to assist its regularly retained counsel in any case where in the wisdom of the authorities it deems it necessary.

2. INJUNCTION. *Damages. Special counsel.*

Where a city employs additional counsel to dissolve an injunction against it, the injunction bond given to obtain such injunction can be made to respond in damages to any reasonable amount necessary to compensate the additional counsel so employed.

3. ACTION AT LAW UPON INJUNCTION BOND. *When brought.*

Until there has been a final determination of the suit in which the injunction bond was executed, no action at law can be maintained thereon, and this is true although the only relief sought by the bill of complaint was an injunction and the court had denied that relief, and dissolved the injunction after full proof, but did not dismiss the bill.

APPEAL from the circuit court of Warren county.

HON. C. S. THOMAS, Special Judge.

Suit by mayor and board of aldermen of the city of Vicksburg against the Vicksburg Water Works Com-

pany et al. From a judgment for plaintiff defendants appeal.

The facts are fully stated in the opinion of the court.

John C. Bryson and Hirsh, Dent & Landau, for appellant.

The legal questions raised by the assignment of error are reducible to four:

1st. Is the plaintiff's suit (having been brought before a final decree in the chancery cause in which the injunction bond was given) premature?

2d. Is the defendant, having regularly retained counsel paid by the month, entitled to compensation for additional counsel employed in the injunction suit?

3d. If it should be held that the plaintiff is entitled to compensation for the special counsel employed to assist the regular counsel in the injunction matter, can it recover by way of damages a reasonable fee for the whole service rendered regardless of that done by regular counsel or must the plaintiff make a reduction to cover the services of the regular attorney whose entire service is covered by his fixed salary?

4th. Has the plaintiff proven any damages on account of liability for attorney's fees?

We shall present these four questions in their order.

1. Was the plaintiff's suit premature? No final decree had been rendered in the chancery suit. In fact no decree of any kind had been rendered in it, except the decree on the motion to dissolve the injunction? By that decree the injunction was dissolved but complainant's suit was not dismissed, nor were damages assessed as might have been done under the statute, the decree providing merely in reference to damages: "That the claim for damages on account of the wrongful suing out of the said injunction interposed by the defendants hereto, be and it is hereby passed for hearing at a future time."

Such was the status of the chancery suit when this suit on the injunction bond was brought. We contend that no right of action on the injunction bond had accrued.

In *Penny v. Holburg*, 53 Miss. 567, Judge Chalmers said: "It was an action upon an injunction bond given to restrain a sale of certain lands under an execution at law. Upon final hearing, the chancellor dissolved the injunction as to a portion of the lands, and retained the cause for further investigation and consideration as to the balance. He granted an appeal from this decree to the supreme court where the order was affirmed and the cause remanded for further proceedings touching the lands as to which no decree had been rendered. Thereupon, without waiting for the action of the chancery court. The court further said: "So long as the suit remains in court undetermined, it is always possible, however improbable, that cause may be shown to reinstate and render perpetual the injunction in whole; and the lower court would not be deprived of the power to do this in a proper case, by the affirmance here of the partial dissolution. It follows, therefore, that until there has been a final determination of the suit in which the injunction bond was executed, no action at law can be maintained. . . ." *High on Injunctions*, par. 981; *Gray v. Veirs* (Md.), 159; *Goodbar & Co. v. Dunn et al.*, 61 Miss. 624; *Railroad Co. v. Adams*, *St. Rev. Agent*, 78 Miss. 977; *Cohn v. Lehman*, 93 Mo. 547.

In discussing the right to sue upon an injunction bond, 22 Cyc., 1045 says: "The plaintiff should allege a final determination of the injunction suit."

Under this text a great many authorities are cited: 10 Ency. of Pleading and Practice, p. 1121; Decennial Digest, vol. 10, p. 2032; 98 N. W. 366; *Lacey v. Davis*, 102 N. W. 535, 126 Iowa 675; *Brown v. Galena Mining & Smelting Co.*, 4 Pac. 1013, 32 Kan. 528; *Johnson v. Bouston*, 77 N. W. 57, 56 Neb. 626.

2. This brings us to the second point raised by the assignment of errors, namely: Is the defendant, having regularly employed counsel, entitled to damages by way of counsel fees?

In *Nixon v. Biloxi*, 76 Miss. 810, this court held: That the city of Biloxi having regularly retained counsel, paid a fixed salary, was not entitled to damages by way of attorney's fees on the dissolution of an injunction where all the services rendered in procuring the dissolution had been by such counsel. *Wilson v. Wilber*, 3 Ill. App. 125, affirmed in 96 Ill. 454.

3. If the court should agree with us, however, as to the full extent of our contentions above certainly the services of the regular counsel should reduce the fee *pro tanto* to the extent of the services rendered by him in procuring the dissolution of the injunction. The evidence shows that the one thousand dollars award was a reasonable fee for the whole service by the city attorney and his two associates, and it further shows that the city attorney, Judge Anderson, rendered a large part of the aggregate service.

Catchings & Catchings, Anderson, Voller & Foster, and Brunini & Hirsch, for appellee.

With all due respect to counsel we submit that the authorities cited by them to the effect that a suit on an injunction bond cannot be brought until a final decree has been rendered in the chancery proceeding, have no application to the case at bar.

It appears from the record of the injunction proceeding, which is a part of the record in this cause, that the suit was brought for an injunction only, and that no other equitable relief was asked for. As shown by the record, the city of Vicksburg had caused to be constructed an elaborate sewerage system, which was practically complete and was being flushed or tested with water from the mains of the Vicksburg Water Works Company,

when that company procured the issuance of an injunction prohibiting the use of its water for that purpose.

The injunction was dissolved; the testing or flushing was proceeded with, and had, in fact, been finished at the time of the trial of this cause in the court below. Nothing, therefore, remained to be done in the injunction suit except the rendition of a formal final decree dismissing the bill.

The case of *Derdeyn v. Donovan*, 81 Miss. 696, is squarely in point. In that case, as in the case at bar, suit was brought upon an injunction bond before the rendition of a decree final in form in the chancery proceeding. Judge Whitfield delivered the opinion of the court and drew the very distinction which we have adverted to above, between cases in which the injunction was the only relief sought, and those in which it was merely ancillary to other grounds of equitable cognizance. He said:

“The distinction as between those cases in which the bill is filed solely for an injunction and in which, of course, the dissolution of the injunction carries with it the dismissal of the bill, and those very different cases in which an injunction is asked for as a mere auxiliary or aid in effectuating the principal relief resting upon distinct equitable grounds. In this class of cases the bill is, of course, retained until final hearing, and it is the better practice, as a rule, not to dissolve such an injunction until final hearing, for the obvious reason that if it were dissolved and the damages allowed, proof subsequently taken might make it proper to reinstate the injunction and require the damages refunded. In this case the dissolution of the injunction ended the whole matter. The equities of the bill as to the conveyance being a valid conveyance are all sworn away by the answer, and the rule in such cases is stated thus in vol. 10, Ency. Pl. and Pr., 1048: ‘As a general rule, upon the coming in of an answer denying the equities of a bill, the defend-

ant is entitled to have the injunction dissolved.' The bill here was for injunction only. When the injunction was dissolved the court dismissed the bill, the case was at an end, and it was entirely proper to allow the damages. The only question litigated or left to be litigated—the equities of the bill being sworn away by the answer—was whether the property was a homestead and what its valuation was."

With all due deference to counsel for appellants we submit that the authorities cited by them in support of the second subdivision of their argument are wholly without application to the facts of the case at bar. So far as we know, there is no authority in the books which holds that one having regularly retained counsel cannot recover by way of damages such reasonable attorney's fee as he may have contracted to pay additional counsel who were employed to procure the dissolution of an injunction. Certainly the authorities cited by counsel bear no such construction.

The right of the city of Vicksburg to employ counsel other than the regularly retained city attorney, and to contract for the payment of their fees, is not, as we understand appellants' brief, denied. That the city has such right is amply sustained by all of the authorities.

This court has held, in the case of *Warren County v. Booth*, 81 Miss. 267, that boards of supervisors who have regularly retained attorneys, may, nevertheless, employ other counsel to represent them in particular cases, and may legally obligate themselves to pay their fees. The reasoning of the court is equally applicable to municipal authorities.

We entirely agree with counsel that appellee was not entitled to recover by way of damages anything on account of the services rendered to it by its regularly retained city attorney, and no such contention was advanced in the court below. Counsel's argument, however, seems to proceed upon the theory that lawyers

must be paid upon a per capita basis, and that because appellee had a regularly retained city attorney the amount agreed by it to be paid its other attorneys should be reduced *pro tanto*. The position assumed by appellee in the lower court, was simply that as it had agreed to pay a reasonable attorney's fee to Messrs. Brunini and Catchings and was legally liable so to do, it was entitled to recover by way of damages such sum as the jury should fix as a reasonable fee in the premises.

MAYES, C. J., delivered the opinion of the court:

On the 15th day of December, 1909, the Vicksburg Waterworks Company applied for and obtained an injunction against the city of Vicksburg, enjoining the city from opening the fire hydrants located in the city and belonging to the waterworks company, and from taking therefrom water for the purpose of cleaning and flushing the new sanitary sewers then being installed in the city. At the time the injunction was issued the waterworks company executed an injunction bond in the sum of one thousand dollars, with the Empire State Security Company as security thereon; the condition of same being: "In case the said injunction shall be dissolved, shall within thirty days thereafter well and truly pay and satisfy all such costs and damages as shall wrongfully result from suing out this injunction, and shall abide by and perform the decree of said chancery court, then this obligation shall be void; otherwise the same shall remain in full force and virtue." In due time an answer was filed on the 31st day of December, 1909, a motion was made to dissolve the injunction, and accompanying the motion notice was filed that three thousand and five hundred dollars damages would be claimed for the wrongful suing out of the injunction. On the 21st day of March, 1910, the motion to dissolve the injunction was heard, and the court decreed that the injunction stand dissolved, and made this further order, viz.: "It is

further ordered that the claim for damages on account of the wrongful suing out of the said injunction, interposed by the defendants hereto, be and it is hereby passed for hearing at a future time." On the 25th day of March the matter of the allowance of damage seems to have been taken up again by the court, and on that day the waterworks company, by way of answer to the application for the allowance of damage for the wrongful suing out of the injunction, stated in a written pleading, filed and sworn to by counsel for the waterworks company, substantially that the only authority of the court to allow damage is to be found in section 624 of the Code of 1906, and that under that section of the Code the damage must be allowed, if at all, on the motion to dissolve, and not afterwards; that, if damage is not awarded at the time the injunction is dissolved, it cannot afterwards be done, except at the final hearing of the cause. Other reasons were given in the answer as to why the court should not take up the question of damage at that time, even though the reasons already assigned were not sufficient; but the latter reasons are predicated on certain facts stated and not necessary to be here repeated. On the same day—that is, on March 25th—by consent of the parties it was ordered that the application for the fixation of damage by the court should be continued until April 15, 1910. In April there seems to have been a decree made by the chancellor, though the decree is unsigned, dismissing the application for damages, "without prejudice to the rights of said defendants to sue for such damage as they have sustained, because of the wrongful suing out of the said injunction, at law upon the injunction bond."

It appears from the proceedings set out above that, although the injunction had been dissolved, the bill had not been dismissed, nor had the court undertaken to allow damages on the bond at the time the decree dissolving the injunction was made, as was done in the

case of *Derdeyn v. Donovan*, 81 Miss. 696, 33 South. 652. In this condition of the chancery suit, with the bill still pending and not finally dismissed, and on the 26th day of March, 1910, the city of Vicksburg, through its proper officers, instituted a suit in the circuit court of Warren county on the bond executed by the waterworks company, with the Empire State Surety Company as security thereon, seeking to recover the sum of three thousand and five hundred dollars as damage for the wrongful suing out of the injunction. The declaration substantially alleges that on a certain day the Vicksburg Waterworks Company wrongfully procured an injunction restraining the city of Vicksburg from using water from the hydrants of the waterworks company for the purpose of testing a certain sewerage system then being installed; that the injunction so wrongfully issued was dissolved by the chancery court on the 21st day of March, 1910; that at the time the injunction was procured the waterworks company gave a bond payable to the city of Vicksburg, conditioned for the payment of all damages occurring by the wrongful suing out of the injunction. The declaration avers the dissolution of the injunction by the chancery court and the accrual of the right thereby to sue on the bond. The bond is made an exhibit to the bill. The declaration nowhere alleges a final disposition of the injunction suit, or dismissal of the bill, nor is any such disposition shown in any of the exhibits or pleadings in the case. When the declaration was filed, appellants filed a demurrer, setting up substantially that the declaration did not allege that the decree dissolving the injunction was a final decree, or that the injunction suit had been finally disposed of. The demurrer was overruled by the court, and at a subsequent date during the same term of court the appellants filed several pleas to the declaration. We shall not set out all the pleas, but give the substance of all. The first plea denied the dissolution of the injunction; the second plea denied that

the plea of dissolution was a final decree, and alleged that the injunction suit was still pending in the chancery court; the third and fourth pleas put in issue the question of the alleged damage; the fifth plea denies the right of the city to claim any counsel fees as damages, because of the fact that the city had regularly retained salaried counsel. Proof was taken on the issue thus raised, and the cause tried, resulting in a verdict in favor of the city of Vicksburg for the sum of one thousand dollars, and from this judgment an appeal is prosecuted.

The appellants asked for and were refused a request for a peremptory instruction. The errors assigned in this court are, first, that the court erred in overruling the demurrer; second, that the court erred in holding that the suit on the injunction bond could be maintained before final decree dissolving the injunction; and third, that the court erred in refusing a peremptory instruction for defendant. There are other errors assigned, but the whole of this case is comprehended under the above assignments of error.

The first contention of counsel for appellants that we will notice is the contention that, because the city had regularly employed counsel on a salary, it could not employ any additional counsel to assist in this cause, so as to make the bond liable for such counsel fees. In support of this contention the case of *Nixon v. Biloxi*, 76 Miss. 810, 25 South. 664, is cited, as also other authorities which we shall advert to later. A city has the same power to protect its civil rights that an individual has. A city may make a valid contract to employ associate counsel to assist its regularly retained counsel, in any case where in the wisdom of its authorities it deems it necessary. Individuals do this, and we can see no reason why a city may not do the same thing. In cases of sufficient gravity different firms of lawyers are employed in the same case and to represent the same cause;

in cases of serious illness, consulting physicians are called to the same patient. Each is entitled to his pay, and in every such case the necessity of so doing must be left to the discretion of the party, or authority, calling in the help. Of course, if bad faith is shown, no liability would attach; but the city is not charged with bad faith, nor does the proof in the case even hint at that. The case of *Nixon v. Biloxi*, 76 Miss. 810, 25 South. 664, and all other authorities cited on this point by appellants, have no application under the facts of this case. The authorities cited merely hold that where the dissolution of the injunction and the services rendered are by a salaried officer, and no additional fees are actually paid, but the service rendered in the official capacity of the person rendering same and as a part of his duty, there can be no recovery on the injunction bond for counsel fees for such service. But the facts of this case do not bring it within the rule declared by the cases cited. See cases cited in the note on page 75 of 16 L. R. A. (N. S.), in the case of *Littleton v. Burgess*. In the case of *Warren County v. Booth*, 81 Miss. 267, 32 South. 1000, this court held that boards of supervisors may employ other counsel in cases in which the county is interested, even though the board have regular counsel employed at an annual salary.

We can perceive no good reason why it should be held that either a county or a municipality must in all cases rely for its prosecution or defense on its retained counsel, and not be allowed to employ associate counsel when in their judgment the necessity arises. If they can employ such additional counsel in any case, they may do so in an injunction suit, as well as in any other, and the injunction bond can be made to respond in damages to any reasonable amount necessary to compensate the additional counsel so employed. An inspection of this record convinces us that the city of Vicksburg had employed associate counsel under a valid contract, and that under

this contract of employment, as shown in the record, if this injunction suit is finally dismissed, the bond given in that suit is liable for a reasonable attorney's fee as compensation to the associate counsel. The city attorney seems not to have rendered any service in this suit, and is certainly not claiming any fees on account of any service rendered by him. The city attorney states that at the time this suit arose he was so busy that it was necessary for associate counsel to be employed, and, as stated by counsel for appellee, "there is not a suggestion in the record that additional counsel was employed merely for the purpose of aggravating the damage."

In setting out the appellant's assignments of error in a former part of this opinion, it will be noted that one of the arguments made here is that the court below erred in overruling the demurrer to the declaration. Appellee insists that this argument cannot be insisted upon in this court, because it is claimed that any right to object to the judgment of the court was waived by appellants when they pleaded to the declaration after the demurrer was overruled. Appellee says: "When a demurrer to a declaration is overruled, two courses are open to the defendant. He can either stand on his demurrer, and let judgment be entered in favor of the plaintiff, and rely upon reversing the judgment on appeal, or he can plead to the merits, in which case he can usually present the same questions by plea which were decided adversely to him on demurrer. Should he pursue this course, he cannot assign as error in the appellate court the action of the trial court in overruling his demurrer. By pleading over he is held to have waived his demurrer, and can only complain of errors committed in the determination of the issues presented by his pleas." Again, counsel for appellee state that "it is contended by appellants that the present action, having been brought, as is claimed, before the rendition of a final decree in the chancery cause, was premature."

We have quoted from brief of counsel for appellee for the purpose of emphasizing the contention made in the case. Before proceeding to discuss the questions involved on the authorities which we shall call attention to a little later, we will say that our view of the contention made by counsel for appellants is, not that the suit instituted on the bond was merely prematurely brought, but that at the time of its institution no cause of action existed, because no final decree of dismissal had been made. It is quite true that in appellants' brief the question is asked: "Was the plaintiff's suit premature?" But further on in the brief counsel for appellants state: "We contend that no right of action on the injunction bond had accrued." But it can make no difference what appellants' counsel stated in the brief as to whether or not he challenged the declaration because premature, or because it failed to state a cause of action. The court, in determining this question, will look to the pleading itself for an interpretation of its legal effect.

It appears from the record that the injunction suit was tried on a mere motion to dissolve the injunction. The cause was not set down for final hearing and the decree of the court extended only to a dissolution of the injunction, and did not attempt to make any final disposition of the cause. Counsel for appellee makes no contention that there was any final judgment dismissing the bill. Section 621 of the Code of 1906 provides that "when, on motion, an injunction shall be wholly dissolved, the bill of complaint shall be dismissed of course with costs, unless sufficient cause be shown against its dismissal at the next succeeding term of the court." This statute has been practically the same since the Code of 1857. See Code of 1857, art. 69, p. 551. In the case of *Pickle v. Holland*, 24 Miss. 566, this court held that an order dissolving an injunction on motion for that purpose did not of itself dismiss the bill. It might be argued, with some force, that since the only relief sought

by the bill of complaint was an injunction, and since the court had denied that relief and dissolved the injunction, the court had the power to dismiss the bill, since the record shows that full proof was made and no suggestion was made that further testimony was desired to be taken, or any improvement or addition desired to be made in the case by way of amendment. But the court did not dismiss the bill, as was done in the case of *Bass v. Nelms*, 56 Miss. 502, and the case of *Derdeyn v. Donovan*, 81 Miss. 696, 33 South. 652. In both of the cases just cited the court dissolved the injunction and dismissed the bill, but not so here.

In the case of *Penny v. Holberg*, 53 Miss. 567, this court held: "It is undoubtedly true, as insisted by counsel for the appellee, that a suit may be maintained, upon a partial dissolution of an injunction for the recovery of such damages as were sustained by reason of its being sued out, to the extent that the same was wrongful, but that this cannot be done until there has been a final disposition of the suit in which the bond was given. Nor will it make any difference that the order of dissolution has been appealed from and affirmed, if the case has by the appellate court been remanded for further proceedings. The reason of this is obvious. So long as the suit remains in court undetermined, it is always possible, however improbable, that cause may be shown to reinstate and render perpetual the injunction in whole; and the lower court would not be deprived of the power to do this in a proper case, by the affirmance here of the partial dissolution. It follows, therefore, that, until there has been a final determination of the suit in which the injunction bond was executed, no action at law can be maintained upon it. High on Injunctions, § 981; *Gray v. Veirs*, 33 Md. 159; *Hanser v. Gray*, 46 Miss. 75."

In the case of *Goodbar & Co. v. Dunn*, 61 Miss. 624, it was argued that the rule announced in *Penny v. Holberg*, 53 Miss. 567, was abrogated by the adoption of sec-

tion 1919 of the Code of 1880, which section in the Code of 1880 is practically the same as section 624 of the Code of 1906; but the court said: "Section 1919 of the Code of 1880 does not change the rule announced in *Penny v. Holberg*, 53 Miss. 567, that an action cannot be maintained on an injunction bond until the final determination of the case. The only purpose and effect of the last clause of the section was to exclude the conclusion that the remedy provided by the section was a denial of the right before recognized to sue on the bond."

The rule announced in *Penny v. Holberg*, 53 Miss. 567, is again redeclared in *Railroad v. Adams*, 78 Miss. 977, 30 South. 44, and in addition to redeclaring this rule the court says: "As we have seen, the right of the plaintiff to sue in this case is dependent upon the final determination of the suit in which the bond is given, . . . and it follows that at the time this suit was instituted no cause of action existed upon the bonds"—it appearing in the above case that no final judgment or dismissal had been rendered. We thus see that we have a declaration of this court that until final judgment there is no cause of action, and this is as it should be, since until final dismissal the bill is subject to amendment, and a case warranting the injunction may be stated.

It is conceded by appellee that if the declaration is so defective as that it fails to state a cause of action, a demurrer to the declaration is not waived, where there is a judgment overruling same, followed by pleading to the merits, and this is but a concession of what all the authorities hold. *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415, 31 Cyc. 746. In the case of *Southern Ry. Co. v. Grace*, 95 Miss. 611, 49 South. 835, this court, speaking through Justice Smith, said: "Where a declaration fails to state a cause of action, as in the case at bar, the defect may be raised by general demurrer, the ground of which is never waived. It can be raised at any time and at any place." We do not think it neces-

sary to further protract the discussion in this case. The requirement that an injunction bond shall not be placed in suit until a final judgment dismissing the bill is based upon just and sound principles of law. The givers of the bond only agree that it shall become liable for damages in the event the person suing out the injunction shall wrongfully do so. Until there has been a final determination of the suit in which the bond is given, it cannot be definitely ascertained as to whether or not there is, or will be, any liability on the bond. Until liability has accrued on the bond, it is merely contingent on the part of the makers, and may never be a real liability. The mere giving of the bond creates no liability, and until there is a liability there is no cause of action, and any declaration failing to state sufficient facts to show liability fails to state a cause of action. The declaration must show the giving of the bond and the final determination of the injunction suit. See 22 Cyc., 1045, note 35.

Reversed and remanded.

ST. LOUIS & SAN FRANCISCO RAILROAD CO. ET AL. v. IDA
SANDERSON ET AL.

[54 South. 885.]

1. CARRIERS. *Passengers. Master and servant. Evidence.*

Where deceased in company with another got upon the platform of a passenger train of appellant about ten o'clock at night, intending to ride a distance of about a mile, the fare being five cents and the conductor did not see these two parties on the platform, nor did they offer to pay fare, though the companion of deceased testified that they were ready and willing to pay same and expected to do so when the conductor should ask them. Whether under these circumstances decedent was a passenger was a question for the jury.

2. SAME. *Master and servant. Conductors.*

The general rule that a master is not responsible for acts done by the servant outside the line of his duty and not in the service of the master, has no application to a case where a railroad passenger conductor, the *alter ego* of the company, himself inflicts the injury on the passenger.

3. INCONSISTENT VERDICT. *Exonerating one defendant and holding another.*
Code 1906, section 4944.

An action against a railroad company and its conductor for the wrongful killing of a passenger by the conductor is both joint and several and although both are equally liable, the liability is based on distinct and different legal principles, the servant because of his personal trespass and the company because of its failure to discharge its nondelegable duty towards the public in not having a competent conductor.

4. SAME.

In such case a verdict for plaintiff against the railroad company and against the plaintiff in favor of the conductor, though apparently inconsistent, presents no ground for reversal of the judgment against the company, especially in view of Code 1906, section 4944, providing that one of several appellants will not be entitled to a judgment of reversal because of error in the judgment against another not affecting his rights.

APPEAL from the circuit court of Monroe county.

HON. JOHN M. MITCHELL, Judge.

Suit by Mrs. Ida Sanderson and others against the St. Louis & San Francisco Railroad Company et al. From a judgment for plaintiff against the railroad company, the company appeals, and plaintiffs prosecute a cross appeal from the judgment in favor of the other defendant.

This is a suit by the appellees, the widow and children of one J. P. Sanderson, for damages for killing of Sanderson by the conductor, Willis, in charge of a passenger train of the appellant railroad company. The record discloses the fact that Sanderson, in company with a young man named Pennington, got upon the platform of a passenger train of appellant about ten o'clock at night, intending to ride from Amory to Aberdeen Junction, a distance of one mile. The fare was five cents. The conductor did not see these two parties on the platform, nor did they offer to pay fares, though Pennington says that they were ready and willing to pay same and expected to do so when the conductor should ask them. The conductor testified that he did not, as a rule, work the train between these two points, but that he occasionally collected fares from persons traveling that distance, and that he did not see the deceased and his companion, nor did he know that they were on the train that night. When the train reached Aberdeen Junction, deceased and his companion got off on the side of the car, and the conductor and two of the passengers stepped off, when the conductor borrowed a pistol from one of the passengers and fired, killing Sanderson. The defense is that he did not shoot at Sanderson, and did not know he was in that direction, and that the killing was purely accidental. This question, however, was submitted to the jury; it being the theory of the appellees that the killing was not an accident, or that at least the conductor was guilty of gross, wanton negligence in firing

the pistol. Suit was brought against the railroad company and the conductor, and the jury returned a verdict for ten thousand dollars against the railroad company, from which this appeal comes.

E. O. Sykes, Jr., for appellant.

We contend that the testimony showed that deceased was not a passenger at the time of his death, and, in fact, had not been a passenger on the Memphis-Aberdeen train that night. That since he was not a passenger, the act of the conductor, when he shot and killed Sanderson, was totally beyond the scope of his employment and authority, and entirely disconnected from any of his duties due his master. For which act the appellant was not liable.

The learned trial judge held that unless Sanderson was a passenger at the time of his death, plaintiff could not recover, but held that the question of carrier and passenger was one to be decided by the jury. We submit that the relation of carrier and passenger never existed between the appellant and deceased. A common carrier of passengers holds itself out as being in the business of carrying passengers from one place to another for hire, upon the intending passenger's performance of certain conditions, and his submission to certain reasonable regulations established by the carrier. The relation of carrier and passenger necessarily arises from contract, either express or implied. The intending passenger must offer himself as a passenger, and the carrier must accept him as a passenger, before the relation exists. It is not essential that the passenger have a ticket, neither does the fact of his having a ticket conclusively show him to be a passenger.

The acceptance by the carrier may be either express or implied, but there must be an acceptance.

Since the carrier owes a very high degree of care to the passenger to carry him safely, or as our court has

expressed it in the case of *Railroad Co. v. Humphrey*, 83 Miss. 733, it owes the passenger the "duty of exercising the utmost care and diligence," it must also be true that the passenger must have complied with all the reasonable rules and regulations of the carrier as a passenger, and have been accepted as a passenger, before the relation begins. The passenger must have placed himself in the care of the carrier or directly within its control, with the *bona fide* intention of becoming a passenger, and must have been accepted as such by the carrier. In this case we do not have to resort to any presumptions or surmises, for we have the testimony of the companion of Mr. Sanderson who was with him from the time he boarded the train at the depot in Amory until he was killed.

Charge No. 9 makes the appellant an insurer of the safety of its passengers from injury from all sources, which is not the law as shown by the following authorities. 3 Thompson on Negligence, § 2721; *Railroad v. Jopes* (U. S.), 142 U. S., p. 28, 35 Law Ed., p. 919.

The court erred in not entering a judgment for appellant based upon the verdict of the jury. These three assignments will be considered together.

This suit was filed against this appellant, T. P. Willis, and the Kansas City, Memphis & Birmingham Railroad Company as defendants.

This suit is based upon the negligence of Willis, the conductor, in shooting his pistol, and the appellant is held liable on the doctrine of "*respondeat superior*." There can be no contention that the master authorized or actively participated in the firing of the pistol. The verdict of the jury found for the plaintiff against the St. Louis & San Francisco Railroad Company in the sum of ten thousand dollars.

The verdict finds in favor of the defendant Willis, with the same force and effect that it finds against the appellant. It says as to Willis: We find that your con-

duct was lawful, and that deceased was not killed either willfully or negligently by you, but that he was killed as a result of an accident pure and simple, for which you are in no way responsible.

The same verdict says as to the appellant: We find against you because Sanderson was a passenger at the time he was killed, and you owed him the duty not to negligently injure him, and that you violated this duty when your conductor or agent shot him, which was a negligent act of your agent for which you, as the master, are responsible.

That the verdict was in favor of Willis is well settled by the following authorities: *Railroad Co. v. James* (Texas), 10 S. W. 744; *Milling Co. v. Abernathy*, 35 N. E. (Ind.) 399; *Doremus v. Railroad Co.*, 54 L. R. A. (Wash.) 649; *Railroad Co. v. Clarke*, 85 Miss. 651.

If the appellant and Willis were joint tortfeasors in the killing, then we would have no right to complain of this verdict, but to be joint tortfeasors, the parties must all actively, in person, participate in the wrong, and the master could only participate in it by authorizing the wrong to be done. Each tortfeasor is himself guilty of a wrong towards the injured independent of the wrong committed by the other tortfeasors. Neither can there be any right of contribution among them, for all of them are *in pari delicto*. This is in no way true in this case. If deceased were a passenger and was negligently killed by Willis, then appellant is liable in this case technically in trespass upon the case, and Willis would be liable in trespass. It is impossible for appellant, however, to be liable and Willis not liable. Yet Willis could be liable for the killing and appellant not liable. As for instance, if Sanderson were not a passenger, and was negligently or intentionally shot by Willis.

This verdict in acquitting the active participant of any negligence, and yet in holding his principal liable, is contrary to the law and the evidence, and shows upon its

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Brief for appellant.

face that it is the result of prejudice and passion against this appellant. We know of only one authority which apparently seems to uphold such a verdict, and that is in this state. The case of *Railroad Co. v. Clarke*, 85 Miss. 691.

It is possible that the facts of that case and these are so different that they may be distinguished. If the act causing the injury in that case was one of nonfeasance of the engineer, the company would be liable and the engineer not. The acts complained of in the *Clarke* case were further part of the ordinary duties of the engineer, in the running of his train, for which the master is made liable to the public, to strangers. We could not be made liable to the public or to any stranger for the unauthorized shooting of Willis. The opinion in the *Clarke* case assumes that the engineer and railroad company were equally liable, in other words, if the engineer be liable in any phase of the case, then the railroad is liable. But in our case the appellant would not be liable unless deceased were a passenger, though Willis might.

We now invite the attention of the court to some of the authorities which sustain our views about this verdict. In the case of *Railroad v. Jopes*, a Mississippi case reported 142 U. S., p. 28, 35 Law Ed. 919; *Doremus v. Root et al.*, 23 Wash. 710, 54 L. R. A. 649; *Gulf C. & S. Fe R. Co. v. James*, 75 Tex. 12, 10 S. W. 744; *Howard v. Jackson*, 91 Ga. 319, 18 S. E. 132; *Kinkler v. Junica*, 84 Tex. 120, 19 S. W. 359; *Gulf C. & S. Fe R. Co. v. James*, 75 Tex. 12, 10 S. W. 744; *June v. Grimmer*, 4 W. Va. 104; *Westfield Gas & Mill Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399; *Hayes Admx. v. Telephone Co.*, 218 Ill. 414, 2 L. R. A. (N. S.) 764; *Stevick v. N. P. R. R. Co.*, 39 Wash. 506, 81 Pac. 1001; *McGinnis v. Railroad Co.* (200 Mo.), 9 L. R. A. (N. S.) 880.

Brief for appellee.

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Leftwich & Tubb, for appellee.

This was a passenger train calling for passengers at every station, throwing open its doors to receive them, and they are as a matter of law charged with the knowledge of those who take passage at regular stations where the trains regularly stopped to take on passengers. The company cannot escape from its liabilities under the facts of this case by saying that they did not see these young men get on; it was their business to see them and they are charged with the knowledge the facts established. These two parties rode but a single mile, to another regular stop on this railroad, the Aberdeen Junction, and there they alighted at the regular place, not at a station house to be sure, but in the path by the side of the track beaten down by the inhabitants of the little village, and where the patrons of the road alighted and got onto said train. The deceased and his companion certainly got on at Amory and they certainly got off at the Junction where deceased was found dying, and every incident and every presumption in favor of the deceased being a passenger is raised from the facts and the circumstances in the case. 3 Thompson on Negligence, §§ 2635 and 2640; *Creed v. Pa. Railway Co.*, 27 Am. Rep. 693; *Railway v. O'Keefe*, 61 Am. St. Sep. 78, and cases there cited; note, *Perkins v. Railway Co.*, 82 Am. Dec. 293, and cases there cited; 4 Elliott on Railways, § 1578.

And, also, says Judge Elliott in his work on Railroads, vol. 4, sec. 1578, "We think it is safe to say that the general rule is that every one on the passenger train of a railroad company, and there for the purpose of carriage, and with the consent expressed or implied of the company, is presumptively a passenger." 3 Thompson on Negligence, § 2675; note, *Perkins v. Railroad*, 82 Am. Dec. 293; *Creed v. Railway*, 27 Am. Rep. 693; *Railway v. Books*, 98 Am. Dec. 229.

Of course, the bona fide intention to become a passenger and to pay the consideration for so becoming

when called upon so to do must exist before that is presumed, and if there is lurking in the heart of the traveler a disposition to beat the railroad company out of its stipend and to rob it of its revenue, the burden rests upon them to show it. 6 Cyc. 536, 537, 538, 539; 3 Thompson on Negligence, § 2638; 4 Elliott on Railroads, § 1579; 2 Woods' Railway Law, § 1037; note, *Railway v. O'Keefe*, 51 Am. St. Rep. 74, 75, 82; *Webster v. Fitchburg Railway Co.*, 24 L. R. A. 521.

Certainly this undisputed evidence indisputably shows the *bona fide* intention in the mind of the deceased and his companion; Sanderson is now dead at the hands of the conductor of this train and cannot speak, but every fact and circumstance as set up by his companion who worked with him that day and who was going with him to his own home ought to be invoked in behalf of his innocence and good intentions.

"One who enters a railroad car intending in good faith to become a passenger is such in fact," says Judge Freeman in his note to the *O'Keefe case*, 61 Am. St. Rep. at page 82.

Much is said in the brief and in the argument and in the evidence about Sanderson and Pennington paying no fare, but the payment of fares is not necessary to make them passengers. Our courts have so held and the courts generally have so held, and it is especially unnecessary in proving a relation under the circumstances of this case where the evidence shows that everybody was allowed to ride without the payment of fare. *Railroad v. Beardsley*, 79 Miss. 417, 30 South. 660; *Hurt v. Railroad Co.*, 40 Miss. 391; note, *Railway v. O'Keefe*, 61 Am. St. Rep. 85, 87; 3 Thompson on Negligence, § 2634 and 2642.

Whether the deceased was a passenger or a trespasser, as we have already anticipated and as this court has already decided, was a question for the jury. Under all the circumstances that hedge in a question of this sort.

the final judge and the best judge is the jury, and the courts have so held. *Railway v. Beardsley*, 79 Miss. 417, 30 South. 660; note, *Railway v. O'Keefe*, 61 Am. St. Rep. 103; *Arnold v. Railway Co.*, 2 Am. St. Rep. 542; *Heggley v. Gilmen*, 35 Am. Rep. 450; *Gordon v. Waycross*, 54 Am. St. Rep. 435.

We do not think we ought to be called upon to argue this subdivision of the case at very great length in the face of the well known position taken some time since by this court. In bringing the suit, the St. Louis & San Francisco Railroad Company, a foreign corporation, and the Kansas City; Memphis & Birmingham Railroad Company, a domestic corporation, and T. P. Willis, the conductor, were all made defendants in this case, as plaintiffs had a right to make them, and the jury were charged as they had a right to be charged and given to understand that they could find one or all of the defendants guilty of the wrong and injury, and this was a matter of discretion for the jury. It was not anywhere asked or suggested to the jury that if they visited no part of the judgment for damages against Willis, that therefore the railroad company, the real responsible party, would escape; that was not even suggested in the trial of the case. Usually the servant of the company is entirely impecunious and nothing can be made out of him and a judgment against him would amount to nothing. The jury in the instant case brought in a verdict against the St. Louis & San Francisco Railroad Company only, the real responsible defendant. It must be supposed that the plaintiffs and their counsel, when they brought the suit and tried the case, brought it and tried it in the light of the holding of this court in the case of *Railway Co. v. Clark*, 85 Wis. 691. That it took no hazard in submitting to the jury the question of damages with all the defendants in the case because they doubtless would not have hazarded a verdict with Willis as defendant had they jeopardized their entire recovery, for it would

have been a very simple proposition to have taken a non-suit as to Willis. Now, after the case has been fought out, and only in the face of the well known position of this court, we submit that we ought not to be called upon to re-open the question as to the inconsistency of the verdict. The Clark case distinctly holds that where the verdict rightfully convicts the master and wrongfully acquits the servant, it ought not to be set aside on motion of the master because of the acquittal of the servant. Our own court not only cites authorities from this state in support of the proposition, but cites a leading and well proved case from another state: *Railroad Co. v. James*, 15 Am. St. Rep. 743, taking the same position.

WHITFIELD, C.

On the trial of this case, which was an action against the St. Louis & San Francisco Railroad Company and T. P. Willis, the conductor, the jury returned a verdict in favor of the plaintiffs against the railroad company for ten thousand dollars damages. But the verdict was silent as to the codefendant, Willis, the conductor. We think, on the authorities, that this amounted to a verdict exonerating Willis, to the same extent as if they had found a verdict for Willis. After the verdict, Willis made a motion, based on this theory, and the court sustained the motion, and entered a judgment discharging Willis from liability. The cross-appeal is prosecuted from this. We think the action of the court was correct on the matter involved in the cross-appeal.

The defendant company later made a motion in arrest of the judgment against it. The railroad company presents four defenses: First, that the firing of the pistol by the conductor, Willis, and the killing of the deceased, Sanderson, the husband and father of the plaintiffs, was an accident pure and simple, and hence that the company was not liable; second, that the firing of the pistol and

the killing of the deceased by the conductor, Willis, if intentional, was a thing not done in the line of his duty while engaged in the service of his master, and hence, being a thing outside the scope of his employment, and not in the line of his duty, the company was not liable; third, that the deceased was not a passenger, and hence the company was not liable; and, fourth, that the verdict and judgment exonerating Willis, the conductor, necessarily operated logically as an exoneration also of the master, and that the verdict for Willis and against the company was an inconsistent, irregular, and illogical verdict, and that the motion in arrest of the judgment, therefore, should have been sustained.

As to the first, the verdict of the jury must be taken as having established the fact that the act was not accidental.

As to the third defense, that the deceased was not a passenger, we think, also, that the evidence as to whether he was a passenger, under all the peculiar circumstances of this particular case as shown by the evidence, was a question of fact for the jury to determine, on proper instructions from the court. The defendant company got the benefit of instructions which told them in varying forms that if they believed from the evidence that the deceased was concealing himself so as to evade the payment of his fare, that he did not have the *bona fide* intention when he boarded the train of paying his fare, but was stealing a ride and attempting to evade his fare, they should find for the defendant company. Under these full instructions on the testimony in the case, the time of the ride being only about five minutes, we think the fact that he was a passenger was properly submitted to the jury for their determination, and that the verdict consequently establishes the fact that he was a passenger. The authorities on this subject have been admirably collected by the counsel on both sides, whose

briefs are able and exhaustive, and we refer to them without further comment.

As to the second proposition, if it should be conceded that the act was not one in the line of the conductor's duty, but was one wholly outside of the scope of his employment and the line of his duty, it is thoroughly well settled that this beneficent principle, applicable in proper cases, that the master is not responsible for the acts done by the servant outside the line of his duty, and not in the service of the master, has no application whatever to a case where the conductor, the alter ego of the company, himself inflicts the injury on the passenger. In Thompson on Negligence, vol. 3, § 3187, it is said: "This calls up a plain distinction between the liability of a carrier of passengers for assaults or insults committed by his own servants upon his passengers and for similar wrongs committed by them upon trespassers or third persons. For such wrongs committed upon his passengers he will be liable in any event, whether in doing them his servant was acting within the scope of his employment or not, since they are a breach of his contract to carry his passenger in safety and with good treatment." And in a masterly opinion by McClellan, C. J., *Birmingham Ry. & Electric Co. v. Baird*, reported in 130 Ala. 334, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43, this doctrine is elaborately discussed and thoroughly vindicated, citing and reviewing a large number of authorities. Judge McClellan, speaking for the Supreme Court of Alabama in that case, says: "And it is of no consequence, when the wrong is committed by the carrier's own servant, even that servant particularly charged with the duty of conserving the passenger's well-being, en route, that the act bears no connection or relation with or to the duties of such servant to the carrier, and is not committed as an incident to the discharge of any duty, but is utterly violative of all duty, and apart and away from the scope of employment, as that term is

understood in the class of cases first above referred to. The carrier is liable in such cases, because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment; and it is manifestly immaterial that the act may have been one of private retribution on the part of the servant, actuated by personal malice toward the passenger, and having no attribute of service to the carrier in it. It is wholly inapt and erroneous to apply the doctrine of scope of employment, as ordinarily understood, to such an act. Its only relation to the scope of the servant's employment rests upon the disregard and violation of a duty imposed by the employment. This is, beyond question, we think, the true doctrine on principle, and while, as indicated above, there are adjudications against it, the great weight of authority supports it."

He quotes in that opinion the following from Chief Justice Ryan in the case of *Craker v. Chicago Railroad Company*, 36 Wis. 657, 17 Am. Rep. 504: "But we need not pursue the subject; for, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or willful, in the negligence or in the malice of the agent, the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in the performance of the duty. If one owe bread to another, and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the prin-

cipal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it." And he also quotes the following from Elliott on Railroads: "There is much apparent conflict among the authorities upon this subject; but we think some of it is due to the use of the term 'scope of employment,' or 'line of duty,' in a different sense in different cases, or to a failure to place the decision on the correct ground. It is not merely a question of negligence in such cases, nor is it a question strictly depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part, whether caused by the willful act of an employee or not. . . . Either the company or the passengers must take the risk of infirmities of temper, maliciousness, and misconduct of the employees whom the company has placed upon the train, and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is, therefore, but just to make the company, rather than the passengers, take the risk, and to hold it responsible." 4 Elliott on Railroads, § 1638.

We approve this as the true rule in this character of cases. The supreme and paramount duty of the conductor, who is the master in such cases, is to protect the passengers from injury, and the absolute character of this duty excludes entirely the operation of the other principle, applicable in proper cases, that the master is not liable for the servant's act, where that act is clearly not in the line of his duty and done outside the scope of his employment. It seems to us a perfectly sound rule, founded in the highest and most beneficent public policy.

The only remaining defense is the technical one, founded in the rules of pleading and practice, to wit, that the verdict and judgment exonerating the conductor necessarily and logically resulted inevitably in the exoneration also of the master. The reasoning is that the master can only be responsible, in a case like this, because the servant is, on the doctrine of *respondeat superior*. It is said with great ingenuity and ability that the master can only be derivatively liable; that is, he is liable, if at all, only because of the act of the servant, when that act makes the servant liable, and a verdict, as in this case, for the conductor, and against the defendant, is inconsistent, irregular, and illogical. The Texas Supreme Court, in *Railway Company v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743, which was a case exactly like this, admitted that the verdict was apparently inconsistent, yet nevertheless said it presented no ground on that account for a reversal of a judgment against the company.

In the case of *Railroad Company v. Clarke*, 85 Miss. 697, 38 South. 97, this court followed the Texas Supreme Court, and rested its judgment on two grounds: First, that if it were assumed in such case that the company and its servants were jointly liable, nevertheless the right of action which the plaintiff had was both joint and several, and that, though both were equally liable, the liability was based on distinct and different legal principles—the servant because of his personal trespass, and the company because of its failure to discharge its nondelegable duty towards the public regarding its custody and management of its dangerous instrumentalities, or, as here, in not having a competent conductor. And the court rests its judgment in the second place on our statute (section 4944 of the Code of 1906; section 4378 of the Code of 1892), which is in the following words: “In all cases, civil and criminal, a judgment or decree appealed from may be affirmed as to some of the appellants and be reversed as to others; and one of sev-

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Opinion of the court.

eral appellants shall not be entitled to a judgment of reversal because of an error in the judgment or decree against another, not affecting his rights in the case. And when a judgment or decree shall be affirmed as to some of the appellants and be reversed as to others, the case shall thereafter be proceeded with, so far as necessary, as if separate suits had been begun and prosecuted; and execution of the judgment of affirmance may be had accordingly. Costs may be adjudged in such cases as the supreme court shall deem proper." This statute was construed in the case of *Weis v. Aaron*, 75 Miss. 138, 21 South. 763, 65 Am. St. Rep. 594. We there said: "When the action of the court below results in merely reversible error as to one of the parties, the other cannot assign here that error."

We think this statute, with this construction placed upon it, is a perfect answer to the argument of learned counsel for appellant on the motion in arrest of judgment. The error assigned by the railroad company, that the verdict exonerating Willis, the conductor, was wrong, at the same time a verdict against the company was rendered, under our statute, and the construction referred to here is at most merely a reversible error as to Willis, not affecting the validity of the judgment against the railroad company. Besides all of which, it is further to be said that we have recently reviewed, on full consideration, the case of *Clarke v. Railroad*, in the case of *Nelson v. I. C. R. R. Co.*, 53 South. 619, and approved and reaffirmed the doctrine of the *Clarke* case on this point, and we remain satisfied of the correctness of our conclusion on the grounds indicated. There are cases to the contrary, which are pointed out by the learned counsel for appellant; but those cases were decided in the absence, so far as they show, of any statute like ours on this subject. Our statute was manifestly intended to do away with the opposite rule, as one which would in many cases sacrifice the substantial rights of parties to

a mere rule of procedure, founded on too refined a basis for the practical administration of justice. In the case of *Sellards v. Zomes*, 5 Bush. (Ky.) 90, cited in *Louisville Mail Company v. Barnes*, 117 Ky. 860, 79 S. W. 261, 64 L. R. A. 574, 111 Am. St. Rep. 273, the court said: "The liability of joint trespassers is several, and any one or all of them may be sued for the entire wrong."

Consequently since our statute of 1836, authorizing several judgments, and dismissal or release of one or more who are sued, cannot *per se* release the others. This construction of the Kentucky statute is exactly our construction of our statute. See, also, the elaborate notes to *Louisville Mail Company v. Barnes*, *supra*, and the note to *Abb v. Northern Pacific Railway Company*, 92 Am. St. Rep. 872. And see the opinion of this court in *Bailey v. Delta Electric Company*, 86 Miss. 634, 38 South. 354, where, in concluding the opinion, it was said: "This is more in accord with justice and in better harmony with the principles of enlightened jurisprudence, which will not permit a party suffering a wrong to be deprived of his right to redress by any purely technical reason."

Affirmed on appeal.

Affirmed on cross-appeal.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment of the court below is affirmed, both on the appeal and cross-appeal.

WILLIAM MILES v. STATE.

[54 South. 946.]

1. CRIMINAL LAW. *Infant. Intent. Evidence. Burden of proof.*

Criminal intent is an essential element of crime. An infant under the age of seven years is by law conclusively presumed to be incapable of distinguishing between right and wrong and therefore incapable of entertaining criminal intent.

2. SAME.

An infant between the ages of seven and fourteen years is *prima facie* presumed to be incapable of entertaining criminal intent, but this *prima facie* incapacity to commit crimes may be overcome by proof that the infant is in fact mentally capable of distinguishing between right and wrong, but the burden of proof in such case is upon the state.

3. SAME. *Admission of evidence. Previous threats.*

In a case of assault and battery with intent to kill, where the evidence is conflicting as to who was the aggressor, previous threats of the prosecutor whether communicated to the accused or not are admissible in evidence for the purpose of throwing light on the question as to who was the aggressor in the difficulty.

APPEAL from the circuit court of Calhoun county.

HON. W. A. ROANE, Judge.

William Miles was convicted of an assault and appeals.

The facts are fully stated in the opinion of the court.

J. L. Bates, for appellant.

We say that this record shows that it is uncertain as to who was the aggressor in the difficulty. If we are correct as to this, the court should have admitted the testimony offered to be proven by the appellant and Henry Lyon. In the case of *Prine v. State*, 73 Miss. 838, our court says:

“When on a trial for an assault with intent to kill, it is not clear who was the aggressor, it is error to exclude testimony offered by the accused to the effect that, on the day of the difficulty, the person shot wanted to exchange knives with one witness, so as to secure a knife with a longer blade, informing the witness that he was going to have a row with the accused that day, and asking him to stand by him, and that there was only one man in the world whom he wanted to kill, and that was the accused, tend to show whether or not he acted in self-defense, as he claimed to have done.” In the case of *Johnson v. State*, 5 So. Rep. 95 and 97, Justice Cooper says: “If on a trial for murder A swears that the accused, and B that the deceased was the aggressor, the killing is of doubtful origin, within the rule, though the jury should on final consideration believe A and disbelieve B.”

In the case of *Bell v. State*, 5 So. Rep. 389, 66 Miss. 192, at the end of the opinion, Justice Cooper says:

“The court erred in excluding evidence of previous but uncommunicated threats made by the injured party against the accused. There was evidence tending to prove that the injured party made the first hostile demonstration and though the jury might have disbelieved that such was the case, yet under the circumstances, evidence of uncommunicated threats is admissible.”

Certainly if it is doubtful in this case who was the aggressor, it would be proper to admit communicated threats.

We contend on authority that it was a part of the state's case, absolutely a necessary element to sustain a conviction, to prove to the satisfaction of the jury that the appellant was capacitated to commit crime; that he knew right from wrong and further it was absolutely incumbent upon the state by competent and positive testimony to completely break through and destroy the presumptive shield of incapacity to commit crime that the

law casts around a child under the age of fourteen years when charged with crimes. A minor charged with crime has the legal presumption of innocence even after the state has satisfactorily proven his capacity to commit crime. Chase's Blackstone, 1877 Ed., pp. 862 and 863; also, see *Joslin v. State*, 75 Miss. 838, 23 So. 515, which is in point. See Ency. of Evidence, vol. 7, pp. 263 and 264 where we find the rule to be that, "The law conclusively presumes that an infant under the age of seven years is incapable of committing crime."

On pages 264 and 265 of vol. 7, on evidence *supra*, we find the rule to be that at common law both in England and in the United States that an infant between the ages of seven and fourteen years is *prima facie* incapable of committing crime and that this presumption decreases with the increase of years. This presumption is not a conclusive one but may be rebutted by evidence clearly proving the existence of that knowledge and discretion deemed requisite to a legal accountability. The burden of proof being always on the state. See, also, 15 So. Rep. 468.

The fourth assignment of error that the court failed to instruct the jury at the instance of the state that the defendant was *prima facie* incapacitated to commit crime.

We again state that it was a necessary element to be proven by the state that the appellant had reached that age of knowledge and discretion that he knew right from wrong and was capacitated to commit crime. If we are correct as to this proposition, then it was the duty of the court, at the instance of the district attorney, or either, to so instruct the jury as to the law in such cases. See *Joslin v. State*, 75 Miss. 838, 23 So., *supra*, vol. 7, p. 265, Ency. Evi., *supra*.

Jas. R. McDowell, assistant attorney-general, for appellee.

As a general rule threats made by one against the defendant and which are not communicated to him, are not admitted in evidence since such threats are not a legal defense for the party guilty of committing the assault. There are exceptions to this rule, however, such exceptions being where the origin of the difficulty is doubtful. That is to say, it is in doubt as to who was the aggressor. It seems clear from this record that the defendant was without doubt the aggressor although he himself testifies to the contrary. It will be observed, however, that by his own testimony, which is contradicted by every other witness, it is only shown that the young boy whom he assaulted assumed a sort of threatening attitude and really never assaulted him. The state's witnesses say that the attacked never did anything. I do not consider, under the facts, that there is any doubt who was the aggressor. Of course, the jury might have believed the defendant and disbelieved everybody else, but even in this event, I submit such an attack was not made upon the defendant as warranted a retaliation which he gave. The facts in the case are so strong that if this error (and it probably was error) occurred I hardly think the case should be reversed, but submit the proposition to the court.

It is next contended that it is not shown by the record that the defendant has the capacity to commit crime, being under fourteen years of age at the time the crime was committed. The general rule of law is that between the ages of seven and fourteen years is *prima facie* evidence that one is not responsible for crime, though as the age increases the responsibility increases. The defendant was so near fourteen that the evidence of his action both at the time the crime was committed and on the trial, were sufficient to convince the jury that he was

criminally responsible. I hardly think that testimony could have carried greater conviction.

Whatever presumption attaches on account of his tender years is absolutely overcome by the testimony, and counsel comes too late to take advantage of that which he did not claim on the trial in the lower court.

ANDERSON, J., delivered the opinion of the court.

The appellant, William Miles, was indicted for assault and battery with intent to kill and murder. There were two trials. On the first trial he was convicted of an assault and battery. A new trial was granted, and on the second trial he was convicted of an assault, and appeals to this court.

The appellant, who was at the time of the alleged crime over seven and under fourteen years of age, struck Nathaniel Harley with a stick, inflicting a serious wound on the head. There is no evidence whatever as to whether appellant was mentally capable of distinguishing between right and wrong. It is contended that for this reason the court below should have granted a new trial; one ground of the motion being that there was not sufficient evidence to support the verdict of the jury.

Criminal intent is an essential element of crime. An infant under the age of seven years is by law conclusively presumed to be incapable of distinguishing between right and wrong—incapable of entertaining criminal intent. At such tender age, the infant is conclusively presumed not to have sufficient mental perception to distinguish between the evil and the good. An infant between the ages of seven and fourteen is *prima facie* presumed to be incapable of entertaining criminal intent; but this *prima facie* incapacity to commit crime may be overcome by proof that the infant is in fact mentally capable of distinguishing between right and wrong.

The burden of showing this rests upon the state, and, if it is not shown, no crime is shown, and an acquittal must result. *Beason v. State*, 50 South. 488; *Joslin v. State*, 75 Miss. 838, 23 South. 515. The court below should have granted a new trial on the ground the evidence failed to show that appellant was capable of committing crime.

The appellant offered to prove by the witness Henry Lyons that, a few days before the alleged crime, the witness Nathaniel Harley, alleged to have been assaulted by appellant, stated to him that the first chance he got he was going to knock appellant's brains out with a brick; and appellant offered to testify that shortly before the alleged crime Nathaniel Harley told him that his (Nathaniel's) mother had told him the next time he got appellant away from home, to knock his brains out with a brickbat. This testimony was objected to by the state, and by the court ruled out; appellant excepting to the ruling of the court. This action of the court is assigned as error. The evidence is conflicting as to who was the aggressor in the difficulty. In this state of case, the proposed evidence of threats, whether communicated or not, was clearly competent, for the purpose of throwing light on the question as to who was the aggressor in the difficulty—whether the blow struck by appellant was in self-defense, as he claims. *Prince v. State*, 73 Miss. 838, 19 South. 711; *Bell v. State*, 66 Miss. 192, 5 South. 389.

We pass on none of the other errors assigned, because, if well founded, they are such as will probably not occur on another trial.

Reversed and remanded.

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1911.

ROSA PEDERRE v. STATE.

[54 South. 721.]

1. CRIMINAL LAW. *Credibility of witnesses. Evidence. Instructions.*

Where one of the witnesses for the state was employed as a detective to report "blind tigers," and testified that he was working for a salary and that the amount he was to receive did not depend upon the number of cases reported by him, but defendant proved that such witness had received one hundred dollars for nine cases of detective work, and offered to introduce an account filed by the witness with the board of aldermen, upon which said amount was allowed. It was error for the court to refuse to allow this account to be introduced as this might have materially affected his credibility with the jury.

2. INSTRUCTIONS. *Weight of evidence.*

An instruction for the state is erroneous which tells the jury, "That they are not authorized under the law to disregard the testimony of the witness merely because he is employed as a detective, but they must give the testimony of such witness the same credence as that

of any other witness, unless they believe from the testimony that such witness has knowingly and corruptly sworn falsely to a material fact in issue," as being upon the weight of evidence and the credibility of witnesses, which are matters peculiarly within the province of the jury, whose judgment should not be influenced by the views of the court in relation thereto.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

Rosa Pederre was convicted of unlawful retailing and appeals.

The facts are fully stated in the opinion of the court.

Currie & Currie, for appellant.

The defendant had a right to dispute his testimony, and to introduce proof to show that as a matter of fact Hammet was not hired and paid as a regular policeman, but on the contrary that he was a special detective, hired to prosecute persons engaged in the unlawful selling of intoxicating liquors, and that he charged and was paid by the "case." As a legal proposition this testimony was entirely competent for two reasons. In the first place it would contradict Hammet. In the second place it would prove a fact, or facts, which would discredit his testimony, at least things which would go to the credibility of his testimony, and which the jury would have a right to take into consideration in weighing his testimony.

Instruction No. 2 granted the state is not a correct announcement of the law on the subject. It puts the testimony of hired detectives on an equal footing with that of disinterested witnesses. The testimony of a hired detective is not on an equal footing with the testimony of disinterested witnesses. Its credibility is always affected by the interest or motive the detective may be shown to have in testifying. The jury were not told that they could consider any interest or motive the detective might be shown to have, in considering the degree of

credit to be given his testimony, but they were practically told they must believe his testimony and convict on it, unless they found that he had knowingly and corruptly sworn falsely, that is, unless he had committed willful perjury straight out. A jury would be authorized not only in disbelieving a detective whom they believed had committed perjury, but any other witness. This instruction was objected to and ought not to have been granted, and the court erred in granting it.

It was the duty of the court to tell the jury that in considering the testimony of the detective Hammet, they might take into consideration any interest or motive the testimony showed him to have in testifying, as affecting the credibility of his testimony. 2 Am. St. Rep. 838, 57 Am. Rep. 835, 97 Am. St. Rep. 457.

Carl Fox, assistant attorney-general, for appellee.

It is said that the court erred when it excluded the question: "You mean you were hired to go out and watch and look and listen to catch people while they were selling whiskey to other persons, or were you to go out and buy whiskey for the purpose of prosecution?" and other questions along the same line, which were excluded by the court. The argument made by learned counsel is that it was competent not only to show that Hammet was a detective, but to show the kind of detective he was as affecting his credibility. 4 Encl. Evi., 626 is cited. The text is, in substance, that there is a distinction between one who merely takes "necessary steps to secure evidence of wrong doing, and one who actually encourages and assists in the commission of the crime merely for the purpose of securing the conviction of the offender," and it is stated that the testimony of the former is not thereby rendered unworthy of credit, but that evidence that a detective is of the latter kind or pursues the last course mentioned affects his credibility. I think, as a matter of logic, this is correct, but

the trouble with learned counsel's argument is that Hammet had already, by his own testimony shown himself to be of the kind "who actively encourages and assists in the commission of the crime merely for the purpose of securing the conviction of the offender." His testimony is that he gave Charlie Drummond a dollar with which to induce the defendant to commit the crime of selling whiskey. He had already discredited himself within the principle contended for by appellant.

It is said that the second instruction granted the state is erroneous. Instruction No. 2 granted the state was proper. It is exactly true just as it is written, both in logic and in law. Instructions Nos. 3 and 4 refused the defendant, are argumentative and on the weight of evidence. If such instructions are ever proper, these do not correctly state the principle. They would have the effect of wholly destroying the testimony of a detective before the jury. See Abbott's Trial Brief, Criminal Causes, pages 652 and 653.

SMITH, J., delivered the opinion of the court.

This is an appeal from a conviction in the court below of the crime of unlawful retailing.

Appellant and Charlie Drummond, one of the witnesses for the state, are neighbors in the city of Hattiesburg, living only a short distance apart. H. R. Hammet, one of the witnesses for the state, was employed by the city of Hattiesburg as a special detective to ferret out and report blind tigers. On the 26th day of September, 1910, Hammet approached Drummond at or near his (Drummond's) residence, requested him to obtain for him a bottle of whiskey, and gave him the money to pay for it. It does not appear from the evidence where or from whom Hammet told Drummond to obtain the whiskey, and Hammet testifies that he does not know where Drummond obtained it, but that he went toward appellant's house and returned with the whiskey. Drummond testi-

fied that he purchased the whiskey from appellant. This was denied by appellant, and, as a part of her defense, she attempted to show that the whiskey was sold to Hammet by Drummond himself. Hammet and the chief of police of the city of Hattiesburg both testified that Hammet was working for a regular salary, and that the amount he was to receive did not depend upon the number of cases reported by him. Appellant proved by a member of the board of aldermen that this was not true, that Hammet had been paid one hundred dollars by the city, but that this was for "nine cases of detective work." Appellant then offered to introduce the account filed by Hammet with the board of aldermen upon which this allowance was made, but an objection was interposed thereto and sustained by the court. If Hammet was not working for a regular salary, but was paid for each case reported, this fact might have materially affected his credibility with the jury. The evidence was in conflict on this point, and the account filed by Hammet, upon which the allowance by the board of aldermen was made, would have disposed of that conflict. The court, therefore, erred in excluding it from the jury.

The second instruction granted the state is as follows: "The court instructs the jury, for the state, that they are not authorized under the law to disregard the testimony of a witness merely because he is employed as a detective; but they must give the testimony of such witness the same credence as that of any other witness, unless they believe from the testimony that such witness has knowingly and corruptly sworn falsely to a material fact in issue." The weight to be given such evidence, which, of course, varies with the circumstances of each case and the credibility of witnesses, are matters peculiarly within the province of the jury, and of which the jury should be permitted to judge, uninfluenced by the views of the court relative thereto. The giving of this instruction was, therefore, error.

As the other matters complained of may not occur on another trial, we express no opinion thereon.

Reversed and remanded.

O. O. HAMPTON v. STATE.

[54 South. 722.]

1. CRIMINAL LAW. *Indictment. Ownership of property. Embezzlement. Evidence. Variance.*

The rules of law in cases of larceny, with reference to alleging and proving the ownership of the property charged to have been stolen, apply with equal force to the crimes of embezzlement, false pretenses and other kindred offenses.

2. EMBEZZLEMENT. *Evidence. Variance.*

The "American Express Company, a corporation," is a materially different concern from the American Express Company, a partnership, and an indictment for embezzling the funds of one cannot be sustained by proof that the funds belong to the other.

3. EVIDENCE. *Admissibility.*

In a prosecution for embezzlement, testimony of defendant's assistant in an express office, that four or five months before the office was set on fire and a shortage discovered, while he and defendant were on their way to the depot to meet a train, the appellant told him he was expecting the supervising agent of the express company, and handed witness a note in an envelope and instructed him to return to the office, which witness did and if he (the appellant) telephoned him that the superior agent had come, to deliver the envelope to the Farmers Bank and take what the bank gave him and put it in the "pony safe," that when the train came, he received a message, but not from appellant, but the depot agent, that the supervising agent of the express company had come; that thereupon he delivered the envelope to the bank and got from it a package marked on the back, four hundred and ninety dollars, which he put in the safe,

and which was there when the supervising agent came, was not subject to the objection that it related to another crime, since it tended to prove the specific crime.

4. **HEARSAY.** *Same.*

Such testimony was not objectionable as being hearsay evidence, as it was competent to show upon what information witness acted.

5. **WITNESSES.** *Harmless error.*

In a prosecution for embezzlement from an express company it was harmless error for the court to refuse to allow defendant on cross examination to ask the superintendent of the express company, for the purpose of affecting his credibility, if he had not made an offer to abandon the prosecution if defendant's shortage was made good, where his evidence as to the material facts, was not controverted.

6. **INSTRUCTIONS.**

The court should not give instructions which are confusing and misleading.

7. **SAME.** *Involving province of the jury. Code 1906, section 1136.*

In a prosecution for embezzlement an instruction that the mere failure on the part of defendant, without explanation, to turn over to his employer the funds in his hands belonging to it, established guilt, is erroneous, since under Code 1906, section 1136, the question whether such failure was sufficient to show guilt was for the jury.

8. **BURDEN OF PROOF.**

The burden of proof never shifts from the state in a criminal case.

APPEAL from the circuit court of Lafayette county.

HON. W. A. ROANE, Judge.

O. O. Hampton was convicted of embezzlement and appeals.

The facts are fully stated in the opinion of the court.

Cassedy & Butler, for appellant.

We say that the motion to direct a verdict for appellant because of the fact of the American Express Company being a corporation should have been sustained. Certainly this is true unless the district attorney should have availed himself of the right to amend the indictment.

ment to conform to the proof unless all precedent shall be ignored; the substantial rights of one charged of a serious offense shall not be lost sight of in the sometimes desperate effort on the part of prosecuting counsel to secure an unrighteous verdict. It will be noted that the indictment is explicit in its charges of embezzlement from the American Express Company, a corporation, whereas from the proof by the testimony of the state witness himself, it is conclusively established that the American Express Company is not a corporation, but to the contrary a partnership.

The crimes of larceny, burglary, robbery, false pretenses, embezzlement, receiving stolen goods, etc., are all frauds and cheats and the same essential elements exist in each. They are governed by the same rules of practice and procedure, founded upon one and the same base. Mr. Bishop says that the rule as to ownership of property is the same in arson, burglary, cheats, false pretenses, conspiracy, embezzlement, malicious mischief, forgery, receiving stolen goods, robbery and larceny. 2 Bishop Crim. Proced., 719, also 2 Bishop Crim. Proced., 36, 137, 173, 211-233, 320, 424, 983 and 1006.

He further lays the rule down at section 723 that "where the goods belong to the business firm or other joint owners, the ownership must be laid in all. Each name should be given in full, simply the partnership name, for example, not sufficing." Now embezzlement is simply a statutory larceny. (2 Bishop on Crim. Law 318.)

In 2 Bishop Crim. Proced., at 320 it is said, "In the absence therefore of the legislative interposition the rule for the description of embezzled property is on the authorities that it shall be the same as on an indictment for the larceny thereof at the common law. The ownership must be alleged with the same accuracy and after the same rules as in the indictment for common law larceny." *Tatum v. State*, 50 So. 490; *McLain on Crim.*

Law, vol. 1, § 707; 2 Bishop on Crim. Proced., 718; *James v. State*, 77 Miss. 370; *McGuire v. State*, 91 Miss. 151; *Froman v. State*, 95 Miss. 77; *Richburger v. State*, 90 Miss. 806.

We say the court erred in permitting witness Hunter to testify to the conversation between him and the appellant and between him and the depot agent and his acts in reference to calling at the bank and getting a package of money and depositing it in the pony safe. *Molineaux v. People*, 62 L. R. A. 194; *Herman v. State*, 75 Miss. 340; *Raines v. State*, 81 Miss. 489.

The fifth instruction in this case is absolutely vicious. It is as follows: "The court charges the jury for the state that if they 'believe from the testimony in this case beyond a reasonable doubt that the defendant had collected certain sums of moneys, no matter what amount, which was then and there the property of the American Express Company and that said moneys were never given to or remitted to the said company then it devolves upon the defendant to give a reasonable explanation of what became of said moneys, and unless said explanation creates in the minds of the jury, a reasonable doubt of the defendant's guilt, then it is the duty of the jury to convict the defendant, provided they believe from all the testimony in the case beyond a reasonable doubt that the defendant is guilty as charged in the indictment.' " This instruction is erroneous for several reasons. In the first place, it predicates embezzlement absolutely upon the mere failure to pay over whereas according to every definition of embezzlement laid down in the law books, the crime consists of something more than this. There must be a fraudulent appropriation, a fraudulent secretion, a fraudulent concealment, a fraudulent conversion or a fraudulent making way with in order to constitute the crime. To constitute a crime the appropriation of the property must be made with the

same intent to deprive the owner with which the taking must be done to constitute larceny at common law.

It is erroneous, however, for another reason. It is a contradiction in terms. Thus the jury is told that unless the reasonable explanation creates a reasonable doubt of guilt then it is the duty of the jury to convict, provided they believe from all the testimony in the case beyond a reasonable doubt that the defendant is guilty. What does this mean? If the explanation renders guilt doubtful then it is a mental and moral impossibility for all the testimony to place guilt beyond a reasonable doubt. This feature of the instruction was condemned in *Pollard v. State*, 53 Miss. 410.

Kimbrough and Slough, for appellant.

An indictment for embezzlement must show the ownership of the property alleged to have been embezzled with the same particularity as in a prosecution for larceny and unless the proof supports the allegation of ownership in an indictment for embezzlement there can be no valid conviction. *Polkinghouse v. State* (Miss. 1890), 7 So. 347, also 68 Miss. 348.

The identity of the owner of the property in embezzlement is very material and should be properly laid and proven. *Clarks Criminal Procedure*, page 229 at top of page. Also, 22 S. W. 955 (Ark.), 58 Ark. 17.

Since it is alleged in the indictment in this case that the owner of the property alleged to have been embezzled was a corporation, it becomes necessary to prove the averment "as descriptive of the offense charged." See *Tyler v. State*, 69 Miss. 395; *John, a slave, v. State*, 24 Miss. 569, and *Dick v. State*, 30 Miss. 631.

The court should not have given the instructions as asked by the state.

The court should have sustained the motion to exclude the testimony and discharge the defendant because of the fatal variance between the indictment and

the proof. Also the court should have sustained the motion in arrest of judgment, and motion for new trial, and discharged the defendant for the reasons set out therein.

Carl Fox, assistant attorney-general, for appellee.

It is contended by counsel for appellant that this case should be reversed because there was a variance between the indictment and the proof, the indictment alleging that the money embezzled was the property of the American Express Company, a corporation, and the proof being that it was a joint stock company or a partnership. Under section 1508 of the Code of 1906, this indictment could have been amended to accord with the proof. If appellant was not prejudiced by the failure to amend the indictment then this case ought not to be reversed on that ground. No continuance was asked for, no suggestion made that defendant was in any way prejudiced by the variance.

In *Richberger v. State*, 44 So. 772, it was held, as is correctly stated in the syllabus, that "where an indictment is amended without the entry of the authorizing order on the court's minutes as required by Code of 1906, section 1509, the court, on objection being made, even as late as a motion for a new trial, is authorized to make the entry *nunc pro tunc*."

In the case of *Peebles v. State*, 55 Miss. 434, it was held that if the defendant does not ask for a continuance upon the amendment of the indictment, he cannot afterwards object that he was surprised and prejudiced in his defense thereby.

The only other contention made here which I desire to answer is that the fifth instruction granted the state is erroneous. I do not think the instruction is correct. However, section 1136, under which the indictment was drawn, provides that if any agent, etc., "shall embezzle or fraudulently secrete, conceal or convert to his own

use or make way with or secrete with intent to embezzle or convert to his own use any goods, etc., . . . he shall be guilty of embezzlement." Now, the defendant admitted having the money which he was charged with embezzling; he admitted that he did not turn it over when demanded. His defense and his only defense was that the money had been robbed was not true, then he had concealed or had made way with the money. I frankly confess that I have no faith in that argument. However, if the court can say, under the peculiar facts of this case, that defendant was not prejudiced, then the case ought not to be reversed because of this instruction.

ANDERSON, J., delivered the opinion of the court.

The appellant, Hampton, was convicted of embezzlement, and sentenced to the penitentiary for three years, from which judgment he appeals to this court.

He is charged with embezzling the funds of the American Express Company. At the time of the alleged embezzlement he had been the agent of that company at Oxford about three years. At about four o'clock on the morning of July 18, 1909, the office of the express company, where appellant was sleeping, was discovered on fire. It was broken into by some parties for the purpose of extinguishing the fire. On entering, the appellant was found lying in bed, and was picked up and carried out. The office was burning from the inside. On investigation it was found that the appellant was short with the express company eleven hundred dollars and seventy-nine cents. This shortage he admitted, but claimed that just previous to the fire the office was entered by some unknown person or persons, who struck him a blow which rendered him senseless, and tied him to his bed with a rope, and robbed him of the funds of the company, which he had in his possession in a shot sack under his pillow. The contention of the state is that the appellant was not robbed, that he set fire to the

office himself, that he was not tied in bed, and that his purpose in setting fire to the office and claiming that he had been robbed was to cover up the crime which he had committed.

The indictment charges the appellant with embezzling the funds of the American Express Company, "which is duly incorporated," while the evidence for the state showed that the American Express Company was not a corporation, but a partnership. It is contended for the appellant that this was a material variance between the indictment and proof. This question was properly raised in the court below by motion to exclude the testimony for the state, which was overruled, by a request for a peremptory instruction to the jury to return a verdict of not guilty, which was denied, and by the motion for a new trial. There was no such offense at common law as embezzlement; it is made such by statute; it is a statutory larceny. The rules of law in cases of larceny, with reference to alleging and proving the ownership of the property charged to have been stolen, apply with equal force to the crimes of embezzlement, false pretenses, and other kindred offenses. 2 Bishop's New Criminal Procedure, § 320; *State v. Tatum*, 50 South. 490. The "American Express Company, a corporation," is a materially different concern from the "American Express Company, a partnership," and an indictment for embezzling the funds of one cannot be sustained by proof that the funds belong to the other.

The state's witness, Hunter, who was appellant's assistant in the express office, testified that, four or five months before the office was set on fire and the shortage discovered, while he and the appellant were on their way to the depot to meet a train, the appellant told him he was expecting McGuirck, who was an agent of the express company having supervision of his and other offices of the company, and handed witness a note in an envelope, and instructed him to return to the office, which

witness did, and, if he (the appellant) telephoned him McGuirk had come, to deliver the envelope to the Farmers' Bank, and take what the bank gave him, and put it in the "pony safe;" that when the train came he received a message, not from appellant, but from the depot agent, Granberry, that McGuirk had come; that thereupon he delivered the envelope to the bank, and got from it a package marked on the back, "four hundred and ninety dollars," which he put in the safe, and which was there when McGuirk came. The testimony was admitted over the objection of appellant. There are two grounds for objection: First, that it tended to prove an entirely separate and distinct embezzlement from the one for which appellant was being tried; second, that the information given the witness by the depot agent was hearsay. It is clear that the testimony was not offered to prove another crime than that for which appellant was tried. The purpose was to prove the specific crime laid in the indictment. The testimony of Kettering, the superintendent of the express company, tended to show that the shortage that was discovered on July 18th, after the fire, was the result of peculations by the appellant covering a period of several months prior thereto, probably running as far back as the latter part of 1908. For this purpose it was clearly competent. The information received by the witness Hunter from the depot agent is not within the rule against hearsay testimony. It was competent to show the information on which Hunter acted, and not for the purpose of establishing a material fact. It was immaterial how Hunter got the information. The material fact proven was that McGuirk did come, which resulted in the four hundred and ninety dollars being placed in the pony safe in accordance with appellant's instructions.

On cross-examination of Kettering, the appellant sought to show, which the court refused to permit, that he (Kettering) had offered to abandon the prosecution

of appellant if the shortage was made good. It is claimed that this testimony was material, as affecting the credibility of the witness. The question of the credibility of witnesses is a broad field of inquiry. It is difficult to lay down any rule prescribing the limitations of such an investigation. This testimony was competent; but, in view of the fact that Kettering's evidence as to the material facts was not controverted, the refusal of the court to admit it was harmless. What reason could there be for showing Kettering's bias and interest, when the substantial facts to which he testified were admitted?

The giving of the fifth instruction for the state is assigned as error. That instruction is in this language: "The court charges the jury, for the state, that if they believe from the testimony in this case beyond a reasonable doubt that the defendant had collected certain sums of money, no matter what amount, which was then and there the property of the American Express Company, and that said money was never given to or remitted to the said company, then it devolves upon the defendant to give a reasonable explanation of what became of said money; and unless said explanation creates in the minds of the jury a reasonable doubt of defendant's guilt, then it is the duty of the jury to convict the defendant, provided they believe from all of the testimony in the case beyond a reasonable doubt that the defendant is guilty as charged in the indictment."

The instruction is plainly erroneous for two reasons: First, it is confusing and misleading. It is difficult to understand what idea the court intended to convey to the minds of the jury. In one clause the jury were informed that a mere failure on the part of appellant, without explanation, to turn over to the express company the funds in his hands belonging to it established his guilt; and in another clause they were informed, by way of proviso, that the testimony should show this guilt beyond a reasonable doubt. And, second, the appellant was in-

Brief for appellant.

[99 Miss.]

dicted under section 1136, Code of 1906. Under the statute it was a question for the jury whether the mere failure by the appellant to turn over to the express company the funds in his hands was sufficient to show guilt. This instruction fixes such failure, without explanation, as conclusive of guilt, and shifts the burden to the defendant to show a reasonable excuse for such failure. The burden of proof never shifts in a criminal case. *Ford v. State*, 73 Miss. 734, 19 South. 665, 35 L. R. A. 117; *Herman v. State*, 75 Miss. 340, 22 South. 873; *Brandon v. State*, 75 Miss. 905, 23 South. 517; *Blalock v. State*, 79 Miss. 518, 31 South. 105; *Raines v. State*, 81 Miss. 489, 33 South. 19. *Reversed and remanded.*

SOUTHERN PACIFIC RAILROAD COMPANY v. A. J. LYON.

[54 South. 728.]

GARNISHMENT. *Jurisdiction. Situs of debt.*

If the garnishee be found in this state and process be personally served upon him therein, the court acquires jurisdiction over him, and can garnish the debt due from him to the debtor of plaintiff, and condemn it, provided the garnishee could himself be sued by his creditors in this state, regardless of the original situs of the debt outside of the state.

APPEAL from the chancery court of Lauderdale county.
HON. SAMUEL WHITMAN, JR., Chancellor.

Bill by A. J. Lyon & Company against the Southern Pacific Railroad Company. Demurrer to bill overruled and defendant appeals.

Bourdeaux & Venable, for appellant.

The first ground or proposition which we wish to discuss is that challenging the jurisdiction of the court on

the ground that the situs of the debt attached in the hands of the New Orleans & Northeastern Railroad Company, or rather sought to be attached, is in Louisiana, or some other state and without the jurisdiction of this court.

The correct solution of this question of jurisdiction depends upon the answers which are given to two questions.

1st. Where is the situs of the debt sought to be bound in the hands of the New Orleans & Northeastern Railroad Company? Of course, if the situs of the debt, sought to be bound in the hands of this resident defendant, is not within the jurisdiction of Mississippi, it cannot be reached by process issuing out of any court of the state and nothing has been attached in this case as provided for by the statute under which the action was brought. This must follow since the action brought by Lyons is a proceeding against specific property, debt or funds, for the purpose of fixing a lien upon it or taking it into legal custody for the purpose of subjecting it to the satisfaction of any judgment which may be finally rendered in the cause. *Railroad Co. v. Smith*, 70 Miss. 344.

We state our contention, briefly, by saying that for purposes of attachment or garnishment the situs of a debt is at the domicile of the creditor (The Southern Pacific Railroad Company). *Railroad Co. v. Smith*, 70 Miss. 344; *Bucy v. Railroad Co.* (Miss.), 22 So. 295; *Railroad Co. v. Nash* (Ala.), 23 So. 825; *Railroad Co. v. Chumley*, 9 So. 286; *Lovejoy v. Albee*, 54 Am. Dec. 630; *Smith v. Eaton*, 58 Am. Dec. 746; *Central Trust Co. v. Railroad Co.*, 68 Fed. 685; *Mason v. Beebee*, 44 Fed. 556.

We now proceed to the discussion of our second question first above asked.

The situs of the debt being in a foreign jurisdiction and for that reason the proceeding, as a proceeding *in rem* having failed, can the court, under the authority of

the statute under which this cause was brought, retain jurisdiction, for the purpose of trying the cause on the merits and rendering a personal decree, the defendant having been personally served with summons or having entered appearance, or, on the other hand, is the existence of the grounds for attachment the *sine qua non* of jurisdiction for any purpose?

We submit that it cannot; that the existence of the grounds for the attachment is the *sine qua non* of jurisdiction for any purpose and they having been determined not to exist the suit must be dismissed for any and all purposes. *Chamberlain Academy v. Port Gibson*, 80 Miss. 517.

The question is one of jurisdiction. The statutes giving the right to, both in law and chancery, are in derogation of the common law, which knew no such proceedings and are to be strictly construed. The courts having no authority to entertain suits of this character except upon grounds and in the cases specified according to a strict construction of the statutes which confer the right and authority. *Rankin v. Dulaney*, 43 Miss. 197.

We submit that the jurisdiction of the chancery court exists only by virtue of the statute and is no greater than that specifically conferred in terms. The statute says (Code 1906, § 536): "The chancery court shall have jurisdiction of attachment suits, etc., against any non-resident, absent or absconding debtor, who has lands or tenement in this state, or where there are persons, who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor. The court shall give a decree *in personam*, against such non-resident, absent or absconding debtor, if summons has been personally served upon him or if he has entered an appearance."

By the very language of the statute, jurisdiction is conferred in two and only two cases: (1) The debtor must have lands or tenements in this state, or (2) there must be a resident or "persons in this state" who have

goods, effects or debts belonging to the non-resident debtor and in addition to this, the debtor must be non-resident, absent or absconding. In the absence of these grounds, the chancery court had no jurisdiction to attach, unless given by the last sentence, which cannot be the case since that only has reference to the action of the court after the debtor has been brought in personally. *Lumber Co. v. Bank*, 86 Miss. 419.

McBeath & Miller, for appellee.

This was an attachment in the chancery court filed under sections 536 and 537, Code 1906, which sections are as follows:

“Attachment against non-residents: The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising *ex delicto* against any non-resident, absent or absconding debtor, who has lands or tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor. The court shall give a decree *in personam* against such non-resident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance.

“The same: How effects or indebtedness bound: When a bill shall be filed for an attachment of the effects of a non-resident, absent or absconding debtor in the hands of persons in this state, or of the indebtedness of the defendant in this state to such non-resident, absent or absconding debtor, it shall be sufficient, to bind such effects or indebtedness, that the summons for the defendant resident in this state shall have stated in or endorsed upon it the nature and object of the suit, and that it is to subject the effects in the hands of the resident defend-

ant, and the indebtedness of such defendant, to the non-resident, absent or absconding debtor, to the demand of the complainant; or, instead of such statement on the summons, a copy of the bill may be served with the summons, and shall bind the effects or indebtedness from the time of such service."

The situs of the debt in this case has nothing to do with the matter. But for a few moments, we will briefly discuss that feature of the case. Since the decision of our court in the cases cited by counsel for appellant, the United States Supreme Court, the highest tribunal in our land, has recently decided the exact case in point, and adversely to the contention of counsel for appellant. *Sturn v. Chicago & Rock Island Railroad Co.*, 174 U. S. 710; *L. & N. R. R. Co. v. Deer*, 200 U. S. 176; *Harris v. Balk*, 198 U. S. 215.

We believe that this court, after a careful perusal of the three United States Supreme Court cases heretofore cited, will reverse the old Mississippi doctrine and will accord to its own citizens the same right in the collection of their debts as given to their creditors in collecting from them.

WHITFIELD, C.

This is an attachment suit in the chancery court, brought under the authority of section 536 of the Mississippi Code of 1906. A. J. Lyon & Co., complainant in the court below and appellee here, sued out an attachment in the chancery court of Lauderdale county, Mississippi, against the Southern Pacific Company and New Orleans & Northeastern Railroad Company. The Southern Pacific Company is a nonresident of the state of Mississippi, and has no lines or agents in the state of Mississippi. The New Orleans & Northeastern Railroad Company is a Louisiana corporation, with its general offices in New Orleans, Louisiana, but owns and operates a line of railroad in the state of Mississippi. The com-

plainant, in its original bill and the several amendments thereto, seeks by virtue of section 536 of the Code of 1906 to subject to the satisfaction of its claim any debt or funds due the Southern Pacific Company. The New Orleans & Northeastern Railroad Company, nominally a codefendant, but in effect a mere trustee or garnishee, filed an answer, in which it set up that it was indebted to the Southern Pacific Company, but that said indebtedness did not arise in the state of Mississippi, that its general offices are in New Orleans, Louisiana, and that said indebtedness was payable by voucher issued from said general offices to said Southern Pacific Company, a nonresident of the state of Mississippi, and set up other facts showing that the situs of the debt was elsewhere than Mississippi. The gravamen of the complainant against the Southern Pacific Company is that it entered into a contract with complainant to safely transport within a reasonable time a car load of goods from Fresno, California, to Meridian, Mississippi, via the Queen & Crescent at New Orleans, but that, notwithstanding its said "*contract*," the defendant wrongfully delivered the said car to the Illinois Central Railroad at New Orleans, which fact caused the car to be delayed in arriving at Meridian, Mississippi, and because of this delay the complainant suffered damages. The original bill of lading issued by the Southern Pacific Company is filed as exhibit to complainant's bill, and is prayed to be made a part thereof. The Southern Pacific Company interposed a demurrer to complainant's bill and set out as grounds for demurrer, among other things, that the situs of the debt was elsewhere than in Mississippi, thereby depriving the chancery court of Lauderdale county of jurisdiction, and that the bill of complaint fails to state a cause of action, for that the contract sued on, to wit, the bill of lading, shows that the Southern Pacific Company undertook only to transport said car from Fresno to El Paso, and that the terms of said bill

of lading, which are binding and conclusive on the complainant, are in hostile conflict with, and in open contradiction to, the vague and general averments of the bill. This demurrer was overruled by the court below, and the Southern Pacific Company was granted an appeal to this court from the said order overruling its demurrer.

The second ground of the demurrer, claiming that no cause of action was set out in the bill because the contract sued on, to wit, the bill of lading, shows that the Southern Pacific Company undertook only to transport said car from Fresno to El Paso, and that the terms of said bill of lading were in conflict with the general averments of the bill, is not well taken. The view asserted by the demurrer is too narrow. The bill of lading must be taken as a whole, and it provided that the Southern Pacific Company should deliver the car to the Queen & Crescent System at New Orleans, Louisiana. The demurrer, of course, admitted this allegation. As a matter of fact, the goods were transported beyond El Paso, more than one thousand miles to New Orleans. Taking all the provisions of the bill into view, this ground of demurrer was not well taken. And this brings us to the serious controversy in the case, which is whether the doctrine announced in the case of *Railroad Co. v. Smith*, 70 Miss. 344, 12 South. 461, 19 L. R. A. 577, 35 Am. St. Rep. 651, is sound. It is in direct conflict with three decisions of the United States Supreme Court: *Chicago & Rock Island Railroad Co. v. Sturn*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144; *L. & N. R. R. Co. v. Deer*, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. Ed. 426; and *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023.

A great deal of the confusion on this subject arises from a too superstitious regard for what is called the situs of the debt. In the case *supra*, in 174 U. S. at page 714, 17 Sup. Ct. 799 (43 L. Ed. 1144), it is said that: "Our attachment laws had their origin in the custom of

London. Drake, § 1. Under it a debt was regarded as being where the debtor was, and questions of jurisdiction were settled on that regard." Again, the court said: "The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do it he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He, and he only, has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. A notice to the debtor must be given, and can only be given and enforced where he is. There is a necessity, and it cannot be evaded by insistence upon fictions or refinements about situs or the rights of the creditor."

In the case of *Harris v. Balk*, *supra*, the court said: "Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. If there be a law of the state providing for the attachment of the debt, then if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that state. We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original situs of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issued. *Blackstone v. Miller*, 188 U. S. 189, 206, 23 Sup. Ct. 277, 47 L. Ed. 439. If, while

temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the situs of the debt was originally. We do not see the materiality of the expression 'situs of the debt,' when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign state, when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defense to such suit for the debtor to plead that he was only in the foreign state casually or temporarily. His obligation to pay would be the same, whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicile of the debtor. If the debtor leave the foreign state without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other state where the debtor might be found. In such case the situs is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid. His obligation to pay to his creditor is thereby arrested, and a lien created upon

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the debt itself. *Cahoon v. Morgan*, 38 Vt. 234, 236; *National Fire Insurance Co. v. Chambers*, 53 N. J. Eq. 468, 483, 32 Atl. 663. We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that state and its laws permitted the attachment. There can be no doubt that Balk, as a citizen of the state of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the privileges and immunities of citizens of the several states, one of which is the right to institute actions in the courts of another state. The law of Maryland provides for the attachment of credits in a case like this. . . . It thus appears that Balk could have sued Harris in Maryland to recover his debt, notwithstanding the temporary character of Harris' stay there. It also appears that the municipal law of Maryland permits the debtor of the principal debtor to be garnished, and therefore, if the court of the state where the garnishee is found obtains jurisdiction over him, through the service of process upon him within the state, then the judgment entered is a valid judgment. See *Minor on Conflicts of Laws*, § 125, where the various theories regarding the subject are stated and many of the authorities cited. He there cites many cases to prove the correctness of the theory of the validity of the judgment where the municipal law permits the debtor to be garnished, although his being within the state is but temporary. See pages 289, 290. This is the doctrine which is also adopted in *Morgan v. Neville*, 74 Pa. 52, by the supreme court of Pennsylvania, per Agnew, J., in delivering the opinion of that court. The same principle is held in *Wyeth Hardware Co. v. Lang*, 127 Mo. 242, 247, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626, in *Lancashire Insurance Co. v. Corbetts*, 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. Rep. 275, and in *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 406,

407, 52 N. W. 905, 17 L. R. A. 84, and to the same effect in *Embree v. Hanna*, 5 Johns. (N. Y.) 101; also *Savin v. Bond*, 57 Md. 228, where the court held that the attachment was properly served upon a party in the District of Columbia while he was temporarily there, that as his debt to the appellant was payable wherever he was found, and process had been served upon him in the District of Columbia, the Supreme Court of the District had unquestioned jurisdiction to render judgment, and, the same having been paid, there was no error in granting the prayer of the appellee that such judgment was conclusive. The case of *Douglass v. Insurance Co.*, 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448, is not contrary to this doctrine. The question there was not as to the temporary character of the presence of the garnishee in the state of Massachusetts; but, as the garnishee was a foreign corporation, it was held that it was not within the state of Massachusetts, so as to be liable to attachment by the service upon an agent of the company within that state. The general principle laid down in *Embree v. Hanna*, 5 Johns. (N. Y.) 101, was recognized as correct. There are, as we have said, authorities to the contrary, and they cannot be reconciled. It seems to us, however, that the principle decided in *Chicago, R. I. & P. Ry. Co. v. Sturn*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, recognizes the jurisdiction, although in that case it appears that the presence of the garnishee was not merely a temporary one in the state where the process was served. In that case it was said: "All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no locus or situs, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere." 2 Parsons on Contracts (8th Ed.), 702; Id. (9th Ed.), 739. The debt involved in the pending case had no "special limitation or provision in respect to payment." It was

payable generally, and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best considered cases, the inevitable effect from the nature of transitory actions and the purpose of foreign laws, if we would enforce that purpose.' The case recognizes the right of the creditor to sue in the state where the debtor may be found, even if but temporarily there, and upon that right is built the further right of the creditor to attach the debt owing by the garnishee to his creditor. The importance of the fact of the right of the original creditor to sue his debtor in the foreign state, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff, in such proceeding in the foreign state, is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishees) creditor, because of the fact that the plaintiff is really in such proceeding a representative of the creditor of the garnishee, and therefore, if such creditor himself had the right to commence suit to recover the debt in the foreign state, his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the state where the attachment was sued out permits it. It seems to us, therefore, that the judgment against Harris in Maryland, condemning the one hundred and eighty dollars which he owed to Balk, was a valid judgment, because the court had jurisdiction over the garnishee by personal service of process within the state of Maryland."

There does not appear to us, after the most mature consideration, any satisfactory answer possible to be made to the force of the reasoning in this case. It is extremely desirable that, upon questions of this sort, this court would be bound to follow the United States Supreme Court. It is obvious that whenever a case might arise, where the judgment of a sister state in this

sort of proceeding was valid under the laws of that state, this court would be bound to follow the the United States Supreme Court, and overrule in that class of cases the case of *Railroad v. Smith*, 70 Miss. 344, 12 South. 461, 19 L. R. A. 577, 35 Am. St. Rep. 651, *supra*, because this court would be bound to give full faith and credit to such valid judgment of a sister state under the Constitution of the United States. It would be a very incongruous spectacle to have one line of decisions of the kind just specified repudiating *Railroad Co. v. Smith*, and another line of cases upholding it, where the facts were identical. Being thoroughly satisfied of the correctness of the view of the United States Supreme Court as an original proposition, and of the incorrectness of the doctrine announced in *Railroad Co. v. Smith*, 70 Miss. 344, 12 South. 461, 19 L. R. A. 577, 35 Am. St. Rep. 651, and realizing the great inconvenience and undesirability of not following the United States Supreme Court in cases of this character, we are constrained to overrule, and do hereby overrule, the case of *Railroad Co. v. Smith*, 70 Miss. 344, 12 South. 461, 19 L. R. A. 577, 35 Am. St. Rep. 651, and all other cases in this state holding that doctrine, and now declare the rule on this subject in this state for the future to be that announced in the case of *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, *supra*.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein stated, the decree of the chancery court overruling the demurrer is affirmed, and the cause remanded for answer, to be filed within thirty days from the filing of the mandate in the court below.

W. T. RIDEOUT, ADMINISTRATOR, v. W. H. MARS.

[54 South. 801.]

1. CONTRACTS. *Illegality. Parties pari delicto. Code 1906, section 2600.*

The general rule is that where parties are in *pari delicto* the court will lend its aid to neither, but there is a well defined exception to this which is that where the paramount public interest demands it, the court will intervene in favor of one as against the other.

2. CODE 1906, SECTION 2600. *Contracts against public policy.*

Code of 1906, section 2600 providing, "no life insurance agent shall make any contract of insurance or agreement other than such as are expressed in the application and policy, nor shall any agent pay or allow as an inducement to insurance any rebate of premiums payable on the policy," etc. An agreement by an insurance agent to induce insurance that the insured should have all the first premium, except three hundred dollars, the amount of the company's share of the premiums, was illegal as contrary to public policy and without consideration.

3. SAME.

In such case although the parties were in *pari delicto* the agent's administrator could recover the balance of the premium from the insured.

APPEAL from the chancery court of Neshoba county.

HON. J. F. MCCOOL, Chancellor.

Suit by W. T. Rideout, as administrator of J. H. Rideout, deceased, against W. H. Mars, to recover the balance of first insurance premium on life insurance policy, written by deceased as agent, for the Union Central Life Insurance Company. From a decree for defendant, complainants appeal.

The facts are fully stated in the opinion of the court.

Flowers, Alexander & Whitfield, for appellant.

So then the only question in this case is whether the administrator of the insurance agent is precluded from

making his claim in the courts to recover the balance of this premium when there was an agreement that it should not be paid, such agreement being in violation of law.

Counsel cite two cases. They quote from *Bohn v. Lowery*, 77 Miss. 426. In that case a physician, who had no license to practice medicine was suing upon an account for professional services rendered. It was unlawful for one to practice medicine without license. This man had practiced medicine without license so to do and was undertaking to collect compensation for his services.

In *Woodson v. Hopkins*, 85 Miss. 171, the second case cited by counsel, there was being carried on a business in which both parties to the suit had been interested which was declared by the court to be an unconscionable business. It was held to be against public policy. One of the parties had appealed to the courts to make the other party account for profits received in the conduct of the business.

In both the above cases the well recognized rule was followed that "a contract founded upon illegal consideration or when made against public policy is void, and no action can be maintained thereon." But in both these cases the claim which was attempted to be prosecuted grew out of an illegal contract and was based upon an illegal contract. The party making the claim was entitled to the thing he was asking for, if at all because the other party had promised to pay it under a contract which was held to be void.

In the case at bar, however, no suit is brought upon an illegal contract. We deny that there was any agreement to grant a rebate. We got the policy for Dr. Mars; he has his policy; he has paid only a part of his premium. When we bring a suit for the balance of the premium he undertakes to defend by setting up a contract which he says and which we say was illegal, if any such contract was made. Dr. Mars owes this premium unless

he is relieved of the payment of it by this agreement which he is undertaking to prove. As we have already stated the principle invoked by counsel for appellee would control, if Dr. Mars had paid the entire premium at first and relying upon an agreement to allow a rebate had brought suit against Rideout to get the money back. In such case Mars would have had to defend upon a void agreement. The promise to refund would have been illegal.

Byrd & Wilson, for appellee.

It appears in the proof that Rideout solicited this policy and he may have made some deduction or concessions to Mars as to the amount of the first premium in order, as testified about, to get the benefit of this large policy as advertisement to aid him in his business of soliciting insurance in this section. Now, if this court should hold from the testimony that this fact is true then all the law that is written on this subject condemns it and neither Rideout nor his personal agent can be heard now to claim any payment above the amount agreed upon to be paid by Mars for the policy, for the contract is not only in violation of public policy but right in the teeth of the Code of 1906, section 2600, which makes it unlawful for an agent to rebate the premiums on policies in favor of any one, and section 2649 of the Code of 1906 makes it a penal offense to give such rebates and prescribes the punishment.

Complainant in his brief admits that the contract is in violation of public policy, but seeks to evade it by contending that appellee has no lawful right to plead the unlawful act as a defense in this cause, and cites certain authorities to sustain their position which have no application whatever to this case. The doctrine is well settled in this state that every contract in violation of public policy, whether it grows out of violation of the statute or otherwise, is outlawed in both the courts of law and equity. *Bohn v. Lowery*, 77 Miss. 426.

ANDERSON, J., delivered the opinion of the court.

This is a bill by the appellant, W. T. Rideout, as administrator of J. H. Rideout, deceased, against the appellee, W. H. Mars; and from a decree in favor of the appellee, the appellant prosecutes this appeal.

The decedent, J. H. Rideout, as agent of the Union Central Life Insurance Company, effected a policy of insurance on the life of the appellee for twenty-five thousand dollars. The policy recites the payment of the first premium of nine hundred and fifty dollars. As a matter of fact, only three hundred dollars of this was paid. The decedent, for the purpose of inducing the appellee to take the insurance, with a view of promoting his own interest as a life insurance agent, by being able to show to others that he had written so large a policy, rebated to the appellee all of the first premium except three hundred dollars, which appellant claims, under his contract of agency with the company, was its share of the premium; the balance being his commission. The appellee and his wife both testified (and the fact is undisputed) that the appellee was to pay and did pay only three hundred dollars of the first premium; the decedent giving him the balance. Cavett, the state agent for the Union Central Life Insurance Company, testified that the first premium was nine hundred and fifty dollars, of which his company's share was three hundred dollars, which had been paid. However, he states, further, that decedent's share of the first premium was only sixty per cent., which is less than the difference between three hundred and nine hundred and fifty dollars. If the decedent was to receive as his commission all of the premium except three hundred dollars, it is evident that it would amount to more than sixty per cent. We are therefore unable, from the record, to reconcile this testimony.

This suit was brought by the administrator of the decedent on the theory that the contract by which decedent rebated to the appellee his interest in the first premium

was void, because without consideration and against public policy. Section 2600, Code of 1906, is as follows: "No life insurance company doing business in Mississippi shall make any distinction or discrimination in favor of individuals of the same class and equal expectation of life in the amount of payments of premiums or rates charged for policies of life or endowment insurance, or in the dividends and other benefits payable thereon, or in any of the terms and conditions of the contract it makes, nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contracts other than are plainly expressed in the application and policy issued thereon; nor shall any such company or agent pay or allow as inducements to insurance any rebate of premium payable on the policy or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance. Whenever it shall appear to the satisfaction of the commissioner, after a hearing before him upon notice that any company, officer, agent, subagent, broker or solicitor has violated any provision of this section, he shall revoke the license of any such company or person to transact business in this state, and no other license shall be issued to any such company or person within one year after such revocation."

The legislature, in passing this statute, recognized that a large and increasing proportion of the people of the state carry insurance on their lives, and that the companies engaged in the business of life insurance had been, and would probably continue, discriminating in favor of some of their patrons as against others. The purpose of the statute, as plainly expressed by its terms, is to secure to all persons equality in the burdens of, as well as in the benefits to be derived from, life insurance. The paramount object is to conserve the public welfare. All persons of the same class and equal life expectancy

are to be treated exactly alike. Their contracts of insurance are to be the same. There is to be no difference, either in their premiums or in their dividends or other benefits. There is to be no contract except that expressed in the face of the application and policy. No reduction or rebate is to be allowed on any premiums. The public interest is made paramount to that of the individual.

The general rule undoubtedly is that where parties are *in pari delicto*, the court will lend its aid to neither. However, there is a well-defined exception to that rule, which is that, where the paramount public interest demands it, the court will intervene in favor of one as against the other. This principle is recognized in *O'Connor v. Ward*, 60 Miss. 1025, where the court said: "But upon still another ground the demurrer should have been overruled. The rule appealed to by the defendant, that when parties are *in pari delicto* the court will lend its aid to neither, is subject to the exception that, where public interest requires its intervention, relief will be granted, though the result may be that the property will be resorted to, or a benefit derived by a plaintiff who is in equal guilt with the defendant.

In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public; the guilty party to whom relief is granted being only the instrument by which the public is served. *St. John v. St. John*, 11 Ves. 535; *Hatch v. Hatch*, 9 Ves. 292; *Morris v. MacCulloch*, 2 Eden 190; *Roberts v. Roberts*, 3 P. Wms. 65; *Smith v. Bromly*, Doug. 695; *Browning v. Morris*, Cowp. 790; *Osborn v. Williams*, 18 Ves. 379; *W. v. B.*, 32 Beav. 574; *Ford v. Harrington*, 16 N. Y. 285."

The claim of the appellant is without any merit whatever, morally, because he is seeking to violate a contract made by his decedent. The interest of the general public, however, must prevail, which is that the appellee shall pay the same for his insurance as all others in his

class. The general good permits the estate of the decedent to receive something he was not morally entitled to, rather than appellee shall have insurance at a less premium than the uniform rate. According to the contract of insurance, the first premium was nine hundred and fifty dollars, which is the same rate all others in appellee's class were required to pay. No other contract not expressed in the application or policy could be made. There was no consideration for the decedent's agreement to rebate a part of the premium. When the appellee accepted the policy, by virtue of the statute he agreed to pay, as the first premium, nine hundred and fifty dollars. The law made him agree to pay that, whether he would or not. The courts will not hear any other contract than that written in the face of the application and the policy. The principle involved is analogous to that declared by the Supreme Court of the United States in *T. & P. Ry. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011. It was held in that case that a contract between a common carrier and a shipper, by which the former agreed to ship goods for the latter at less than the rate fixed by the Interstate Commerce Commission, was illegal and void, and the carrier could recover from the shipper the difference between such contract rate and the legal rate, notwithstanding the contract, and whether the rate contracted for was known to the parties to be illegal or not. The principles involved in *Bohn v. Lowery*, 77 Miss. 426, 27 South. 604, and *Woodson v. Hopkins*, 85 Miss. 178, 37 South. 1000, 38 South. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275, relied on by appellee, have no application to the facts of this case.

A decree would be entered here for the appellant, except for the apparent conflict in the testimony as to what was the decedent's share of the premium. That this may be determined, the case is reversed and remanded.

Reversed and remanded.

GEORGE L. CARTER v. STATE OF MISSISSIPPI.

[54 South. 805.]

SEDUCTION. *Evidence. Corroboration, Criminal Law Code 1906, section 1372.*

The allegations of an indictment under Code 1906, section 1372 that the woman seduced was "of previous chaste character" and that the carnal knowledge was obtained "by virtue of a false or feigned promise of marriage" cannot be maintained on the testimony of the prosecutrix alone, she must be corroborated by evidence upon these two points.

APPEAL from the circuit court of Attala county.

HON. G. A. McLEAN, Judge.

George L. Carter was convicted of seduction, and appeals.

The facts are fully stated in the opinion of the court.

Teat & Niles, for appellant, filed an elaborate brief dealing with the facts and citing the following authorities: *Norton v. State*, 72 Miss. 128; *Ferguson v. State*, 71 Miss. 805; *Stewart v. Graham*, 93 Miss. 251; *I. C. R. R. Co. v. McGowan*, 92 Miss. 663.

Carl Fox, assistant attorney-general for the state, filed brief covering the facts in the case and citing: *Owens v. State*, 63 Miss. 450; *Dukes v. State*, 80 Miss. 353; *Holifield v. City of Laurel*, 54 South. 488; *Ferguson v. State*, 71 Miss. 805-815.

McLAIN, C.

Appellant was indicted, tried, and convicted in the circuit court of Attala county for seduction, and was sentenced to the penitentiary. From this judgment, he appeals to this court.

The indictment was drawn under section 1372, Code of 1906, which provides that: "If any person shall obtain carnal knowledge of any woman, or female child, over the age of eighteen years, of previous chaste character, by virtue of any feigned or pretended marriage or any false or feigned promise of marriage, he shall, upon conviction, be imprisoned in the penitentiary not more than five years; but the testimony of the female seduced, alone, shall not be sufficient to warrant a conviction." This section has been thoroughly considered and construed by this court. *Ferguson v. State*, 71 Miss. 805, 15 South. 66, 42 Am. St. Rep. 492; *Norton v. State*, 72 Miss. 128, 16 South. 264, 18 South. 916, 48 Am. St. Rep. 538.

The uncorroborated testimony of the woman is insufficient to convict. The allegation of the indictment that she was "of previous chaste character," and that the carnal knowledge was obtained "by virtue of a false or feigned promise of marriage," cannot be maintained on the testimony of the prosecutrix alone. The prosecutrix must be corroborated by evidence upon these two points. Such is the burden, so to speak, placed upon the state in cases of this character. Has the state met this burden? Without going into the details of the evidence, suffice it to say that we have carefully and thoroughly considered this record, and we are of the opinion that the testimony of the prosecutrix upon the two vital points, to wit, that she was of previous chaste character, and that the carnal knowledge was obtained by virtue of a false or feigned promise of marriage, is not sufficiently corroborated. Especially is this true on the promise of marriage.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated by the commissioner, the case is reversed and remanded.

W. H. GALLASPY'S SONS Co. v. T. A. MASSEY.

[54 South. 805.]

1. HUSBAND AND WIFE. *Divorce and alimony. Lis pendens. Code 1906, sections 1673 and 3148.*

A wife's right to alimony constitutes such an interest in her husband's real estate as that she may take advantage of the *lis pendens* statute Code 1906, section 3148 to protect such interest.

2. DIVORCE. *Alimony. Lis pendens. Code 1906, section 1673.*

Where a wife files a bill for divorce from her husband and prays for alimony as provided in Code 1906, section 1673 and in her bill describes the real estate of her husband and asks that a lien be established thereon for the alimony allowed her, and at the same time has a notice put on the *lis pendens* docket of the county to the effect that she had instituted a suit for alimony involving this land, and afterwards a decree is rendered reciting that a lien was thereby established on the property described in the bill and previously placed on the *lis pendens* docket, she acquires a lien superior to a deed of trust executed by the husband alone after the filing of the *lis pendens* notice.

APPEAL from the chancery court of Newton county.

HON. SAMUEL WHITMAN, JR., Chancellor.

Suit by W. H. Gallaspy's Sons Company against Mrs. T. A. Massey, who filed a cross bill. From a decree granting the prayer of the cross bill, complainant appeals.

The facts are fully stated in the opinion of the court.

Flowers, Fletcher & Whitfield, for appellant.

That a claim made for alimony is personal and that property of the defendant cannot be tied up by describing it in the bill and by a *lis pendens* notice, see *Houston v. Timmerman* (Or. 1889), 11 Am. St. Rep. 484. That state had a statute which gave the wife one-third interest in the land and had notice put on the *lis pendens*

docket. A creditor of the husband sued him and got judgment before the wife got the divorce. The judgment lien was held to be superior to the right of the wife upon getting her divorce. The same rule is followed by the Maryland court in *Feigley v. Feigley*, 61 Am. Dec. 371, 380. There the court said:

"The doctrine of *lis pendens* has no application whatsoever to this case. As well might a pending action at law to recover an ordinary debt be a *lis pendens* as to the property of a debtor as a proceeding like the present, the purpose of each being to subject the property of the debtor to the payment of debts. *Lis pendens* is a proceeding directly relating to the thing or property in question."

The case of *Feigley v. Feigley*, *supra*, and others are referred to by the Nevada Court in *Powell v. Campbell*, 19 Am. St. Rep. 350. Beginning on page 359 the court says:

"In many cases, where as in divorce proceedings, the application is for alimony proper, that is, an allowance to be paid at regular periods for the wife's support, and especially where there was no statute allowing her any specific part of the husband's estate, it has been held that the rule of *lis pendens* does not apply to any specific part of the personal or real estate of the husband. *Almond v. Almond*, 4 Rand. 662, 15 Am. Dec. 781; *Brightman v. Brightman*, 1 R. 1, 112; *Feigley v. Feigley*, 7 Md. 562, 61 Am. Dec. 375. But where the statute permits the husband's estate to be set apart to the wife for life, or, if necessary, in fee, for her support, and in her complaint she specifically describes property which she asks the court to decree to her for her support, there seems to be no well founded reason why the rule of *lis pendens* should not apply. True, it may be said that support is but an incident. But it is also true that when divorce is sought and granted, and support is required from the husband, the law permits the court, and it is the

court's duty, to provide such support as is reasonable and just under all the circumstances. In such a case, a purchaser *pendente lite*, with notice of the suit and its object, knows that the property described may be decreed to the wife, and that one of the objects of the suit is to obtain a decree awarding such property to her. *Wilkinson v. Elliot*, 19 Am. Rep. —.

The word alimony is a technical term, theoretically restricted to personalty, and practically to money; and while it is payable out of the husband's estate, real as well as personal, it never covers the estate itself. That this is the true meaning of the word is not disputed and therefore it is generally held that an award of property to the wife as alimony is improper where there is no statute express or implied, authorizing it. 3 Ency. L. & P., p. 92.

The encyclopedia contains general statements to the effect that real estate may be charged with a claim for alimony when it is described in the bill or petition and that in such cases it is proper to give the *lis pendens* notice.

See 21 A. & E. R. of L. 642; 25 Cyc. 1459; 3 Ency. L. & P. 193. These general statements, however are misleading. There must be a proper statute to authorize such procedure. There must be found in a statute the jurisdictional authority to set apart or subject specific property to claim for alimony.

Under our statute, section 1673 of the Code, the court may make all orders touching the maintenance and alimony of the wife, or any allowance to be made to her, and may, if need be, require sureties for the payment of the same.

But in the case at bar the appellant holds title to this property by virtue of the trustee's deed made at the foreclosure of the trust deeds which were given before the husband and wife separated and which were signed by this appellee herself. There were two trust deeds

which she signed, Nos. 1 and 2. They covered all the land which the court decreed to her in this case. These two trust deeds were foreclosed and the land was sold under them and this appellant bought at the foreclosure sale and paid the money and deed was made by the trustee. It is true that the deed was made by the trustee by virtue of a foreclosure of three instruments, but the third instrument, while it covered this property also covered another twelve acres and the fact that the sale was made under that third instrument also could not prevent the appellant, nor take from it, the right to refer its deed to these two trust deeds signed by appellee. His deed is supported by these two instruments as well as by the other instrument.

Foy & Banks, for appellee, filed an extended brief too long for publication, contending that a divorce and alimony suit containing a description of the husband's property, with entry of the proper notice on the *lis pendens* docket, constitute *lis pendens*, and is notice and binds the property in the hands of one purchasing the same, with notice, during the pending of such suit; citing: *Goff v. Goff*, 60 W. Va. 9; 9 Amer. and Eng. Cases, 91; 2 L. R. A. 48; Freeman on Judgments, par. 198; 25 Cyc., page 1459; 21 Amer. and Eng. Ency. of Law, p. 596-598; 1 Beach on Modern Equity Jurisprudence, par. 349, 353, 354, 360; *Buck v. Pain*, 50 Miss. 348; *McLeod v. First Nat. Bank*, 42 Miss. 112; *Buck v. Pain*, 52 Miss. 271; 15 Amer. and Eng. Ency. of Law, 2d Ed., 640; 15 Amer. and Eng. Ency. Law, 2d Ed., pp. 533, 534; *Campbell v. Adair*, 45 Miss. 182; *Suter v. Suter*, 72 Miss. 345; 2 B. & P. 228, note; 2 Kent 532; 113 N. Y. 582; Bouvier's Law Dictionary; 15 Am. and Eng. Ency. Law, p. 546; *Murphey v. Renner* (Minn.), 8 L. R. A. (New Series), 565; *Scott v. Scott*, 73 Miss. 575; 28 Amer. and Eng. Ency. Law, 2d Ed., p. 775; Amer. and Eng. Ency. Law, 2d Ed., p. 19, and authorities therein cited; 13 Amer.

and Eng. Ency. Law, 2d Ed., 818; *Price v. Halsell*, 90 Miss. 171.

MAYES, C. J., delivered the opinion of the court.

The appellee, Mrs. T. A. Massey, for some years prior to the 23d of February, 1906, was the wife of J. M. Massey, and they lived together as such. About the 23d of February Mrs. Massey was driven from her home by the cruelty of her husband, and never returned to live with him any more. It seems that he had been cruel and unkind to her for a long time prior to the above date, and that these continued cruelties culminated in a final separation on the 23d of February. On the 5th day of March, 1906, Mrs. Massey filed a bill in the chancery court of Newton county, seeking a divorce from her husband, and also praying for alimony. On the day she filed this suit she also sought to establish a lien on her husband's estate for the payment of the alimony sought to be recovered, and in order to accomplish this she described the land in controversy in her bill, and asked that this land be subjected to any decree for alimony which she might recover, and at the same time she had a notice put on the *lis pendens* docket of the county to the effect that she had instituted a suit for alimony involving this land. On June 5, 1906, the court allowed Mrs. Massey alimony *pendente lite*, and on December 6, 1906, a final decree was rendered allowing Mrs. Massey six hundred dollars alimony and fifty dollars attorney's fees, and the decree recited that a lien was thereby established on the property described in the bill and previously placed on the *lis pendens* docket. The decree further provided that execution might issue for the payment of six hundred and fifty dollars if not paid within the sixty days. The land in controversy involves two tracts, one containing eighty-two acres of land and the other one hundred and sixty acres, making two hundred and forty-two acres altogether.

Previous to the institution of this suit for divorce, and on the 22d day of December, 1900, Mrs. Massey joined her husband in the execution of a trust deed on eighty-two acres of the land to secure an indebtedness of one hundred and fifty dollars owing to J. J. Gaines and due December 1, 1901, with interest at ten per cent. It also appears that on December 4, 1903, she joined her husband in the execution of a trust deed on one hundred and sixty acres of the land to secure an indebtedness of four hundred dollars owing to F. W. Gaines and bearing ten per cent interest, due November 1, 1904. These trust deeds were subsequently bought by Gallaspy Sons Company and duly transferred to them by the holders. At the date of the final separation of Mr. and Mrs. Massey, the above trust deeds were enforceable demands against the lands, and so continued to be up to the time of and after the decree of divorce and for alimony was rendered. It appears that, at the time of the separation of Mrs. Massey and her husband, Mr. Massey was indebted to Mrs. G. E. Gallaspy, administratrix of her husband, in open account, a sum amounting to nine hundred thirty-eight dollars and twelve cents. After the separation, and several weeks after the suit for divorce and alimony was begun, that is to say, on the 20th day of April, 1906, J. M. Massey executed to Mrs. G. E. Gallaspy, administratrix, a third trust deed on all the land included in the two above-named trust deeds, and additionally on twelve acres of land not before included in either of the first trust deeds; this last trust deed being executed for the purpose of securing the amount of this open account then due to Mrs. Gallaspy. Mrs. Massey did not join in this last trust deed, and it may be here stated that, in so far as this record discloses, all of the above securities were given in good faith and only for the purpose of securing *bona fide* debts. At the date this controversy arose W. H. Gallaspy Sons Company owned the first two trust deeds by assignment, and Mrs. Gallaspy, adminis-

tratrix, was the owner of the third trust deed, and by substitution the same person was made trustee in all the trust deeds. All of the above amounts being due and unpaid on the 5th day of March, 1907, the trustee advertised all of the lands in all three trust deeds for sale; the advertisements in all respects complying with the law, or at least this is not a controverted point. The foreclosure sale was advertised for March 29, 1907, and on that date all of the property was sold, Gallaspy Sons Company becoming the purchasers for the sum of fourteen hundred and eighty-five dollars, and a deed was duly made by the trustee.

In the meantime, a decree having been rendered in Mrs. Massey's favor for six hundred and fifty dollars on December 6, 1906, an execution was issued under this judgment on March 11, 1907, whereunder the property was levied on and advertised to be sold on May 6th. On that date the same property was sold by the sheriff under execution, and Mrs. Massey became the purchaser, bidding the sum of six hundred dollars. Subsequently a deed was made by the sheriff under this sale to Mrs. Massey. So that on the 29th of March, 1907, Gallaspy Sons Company obtained a deed by virtue of the trustee's sale and claim to be the owners thereof, and on May 6, 1907, Mrs. Massey obtained a deed to the same property under the sale made by the sheriff. Mrs. Massey does not dispute the validity or priority of the first two trust deeds executed by herself and husband, but denies the priority of the last trust deed over her claim for alimony, and at the same time the trustee undertook to sell the property Mrs. Massey offered to pay all due under the first two trust deeds. This offer was rejected, unless she paid all due under all three of the trust deeds, and over her protest the property was sold by the trustee in order to collect all due under the three trust deeds. The purchaser, Gallaspy Sons Company, was fully advised and bought with full knowledge of all the facts,

but claims to have credited so much of the fourteen hundred and eighty-five dollars as was due under the first trust deeds to their own claim, and to have paid the excess to Mrs. G. E. Gallaspy on her account.

After all of the above transpired, suit was filed by Gallaspy Sons Company, claiming to be the true owners of the property, and seeking a cancellation of Mrs. Massey's deed. Mrs. Massey answered, making her answer a cross-bill, praying for the cancellation of the deed made by the trustee to Gallaspy Sons Company on payment to them by her of the amount found to be due under the first two trust deeds executed by her husband and herself, and, after this was done, praying for the granting and confirming of her title to the property. The additional twelve acres of land, not included in *lis pendens* notice, is not in controversy. On final hearing the court adjudged Mrs. Massey to be the owner of all the land described in her bill, subject to the lien of the first two trusts deeds, and canceled the trustee's deed made to Gallaspy Sons Company, ordering an account to be stated as to the amount due under the first two trust deeds, and making any amount found to be due a lien on the land. From this decree an appeal was prosecuted.

The sole question to be determined in this case is whether the wife's right to alimony is of such character as that she may protect and enforce it, as against the estate of her husband, through the medium of *lis pendens* provided for by chapter 89 of the Code of 1906. We have no hesitancy in asserting the affirmative of the proposition. While counsel for appellant cite many authorities denying the right, and are persuasively able in arguing the correctness of the cases which they cite, questions of this character must be settled exclusively by the laws of the state in which the question arises, where there is a law on the subject, and in this state we think this question is settled both by statute and decisions. We think that an examination of our statutes and deci-

sions on the subject of the wife's right to alimony, and the character of this right as constituting an interest in her husband's estate, will demonstrate that it is of such a substantial nature as that she may invoke any remedy known to the law to enforce and protect it. Section 1673, Code of 1906, provides that, when a divorce shall be decreed from the bonds of matrimony, the court in its discretion may make all orders touching the maintenance and alimony of the wife. In the case of *Garland v. Garland*, 50 Miss. 694, this court held that the right of the wife to maintenance by the husband was a vested right; and in the case of *Scott v. Scott*, 73 Miss. 575, 19 South. 589, this court also held that: "Although the wife may not have any estate in the land, and, therefore, may not be entitled to maintain a bill for the single purpose of vacating the invalid conveyance by her husband of the homestead, her right to alimony out of his estate supplies the interest which enables her to attack the deed in order that the property thereby conveyed may be subjected to her claim." From the above cases it appears that this court has held that the wife's right to alimony constitutes an interest in her husband's estate.

This being true, section 3148, Code of 1906, may be invoked by her to protect and secure that interest. Section 3148 is as follows: "When any person shall begin a suit in any court, whether by declaration or bill, or by cross-complaint, to enforce a lien upon, right to, or interest in, any real estate, unless the claim be founded upon an instrument which is recorded, or upon a judgment duly enrolled, in the county in which the real estate is situated such person shall file with the clerk of the chancery court of each county where the real estate, or any part thereof, is situated, a notice containing the names of all the parties to the suit, a description of the real estate, and a brief statement of the nature of the lien, right, or interest sought to be enforced. The clerk shall immediately file and record the notice in the

lis pendens record, and note on it, and in the record, the hour and day of filing and recording." From an inspection of the above section it is readily seen that any person having not only a lien upon or a right to any real estate may take advantage of the *lis pendens* statute, but it may also be done by any person having "an interest in" the real estate.

The wife had an interest in this real estate for the purpose of enforcing her vested right to maintenance, and she had a right in law to have this interest protected and it is our judgment that the decree of the chancellor so holding was correct, and the case is affirmed.

Affirmed.

ELBERT GABLES v. STATE.

[54 South. 833.]

1. CRIMINAL LAW. *Witnesses. Impeachment. Contradictory statements. Instructions.*

Where a witness for the state testified that he saw the accused commit the offense charged and denied on cross-examination that he had told another that whoever said witness knew who committed the offense falsified, it was error not to allow accused to show that witness had so stated, although witness admitted saying that he did not know anything about the offense.

2. INSTRUCTIONS. *Credibility of witness.*

An instruction for the state is erroneous which charges the jury that "They are the sole judges of the evidence in the case and may believe one witness and disbelieve another on the ground of relationship of the witness to the defendant, or for any other reason satisfactory to the jury."

APPEAL from the circuit court of Calhoun county.
HON. W. A. ROANE, Judge.

Elbert Gables was convicted of malicious mischief and appeals.

The facts are fully stated in the opinion of the court.

Dunn & Patterson, for appellant.

The question as to whether Hollis saw Gables break the windows being the issue before the jury, it will be conceded, we think, that any evidence that tended to weaken the testimony of the witness Hollis was all important to the defendant and if it could be shown by any witness that the defendant had made statements out of court contrary to what he states in court, the court should have permitted it to have gone to the jury as affecting the credibility of the state witnesses.

In other words, that the witness Hollis should not have been permitted to have escaped impeachment by merely admitting that he had made a part of the statement about which he was interrogated.

The court would not even permit the counsel to state in the record what he expected to show by the witness, Gay Hawkins, that the defendant had made the statement as laid in the predicate, but sustained an objection and ended the matter right there.

Of course it was error in the court to refuse the defendant the right to show by his witness that the witness Hollis had made the statement. A juror or a jury might accept the statement of a man who had made a statement that he did not know anything about a matter and then explain that he did not think it was any concern of the man who was asking him, and afterwards testifying that he did know about it, but it would take a rather credulous jury to believe a man who said that he did not know anything about the matter, and then to be so indignant that it had been reported that he had made the statement that he would denounce the man who said it as a liar. Yet, in this case, the defendant was not permitted, though he had laid the proper predicate in the

interrogation of the witness, to show that the defendant had denounced whoever said that he had made the statement, as a liar. In other words, the defendant lost the force of the entire statement as would have been shown by his impeaching witness.

“The court charges the jury for the state that they are the sole judges of the evidence in this case and the jury may believe one witness and disbelieve any other witness on the ground of relationship of the witness to the defendant, or for any other reason satisfactory to the jury.”

This was certainly tantamount to telling the jury to disbelieve the witness Neal because he was related to the defendant. Or, if in spite of that admonition of the court, the jury still persisted in believing the witness Neal, the court further told the jury in another clause of the same instruction “or for any other reason satisfactory to the jury.” This charge in effect tells the jury that even though they believe what Neal said was true they might disbelieve and disregard his testimony merely because he was related to the defendant. The court further tells the jury in that charge, that they may disregard the testimony of the witness “for any other reason satisfactory to the jury,” that is whether the reason arises out of the evidence or not; as has recently been said by this court this is not the law, never has been, and it is to be hoped never will be. *McEwen v. State*, 16 So. Rep. 242; *Riley v. State*, 75 Miss. 352; *Jeffries v. State*, 77 Miss. 757.

Jas. R. McDowell, assistant attorney-general, for appellee.

The first assignment of error which is argued is that defendant was not permitted to contradict state's witness Hollis' by the testimony of Gay Hawkins about a matter which Hollis had himself admitted that he had made a statement contradictory to that made by him as

a witness on the stand. The authorities are divided on this proposition, some holding that a witness cannot be impeached on such matter, others holding that even though the witness admits having made a contradictory statement yet an impeaching witness may be introduced not so much to show that the witness had previously made a contradictory statement as for the purpose of contradicting a statement made by him on the stand. Yet, even though it should be error to have refused to admit the testimony of Gay Hawkins as an impeaching witness, still it is not a reversible error. There seems to be no division on this proposition. Neither would it have been reversible error, if error at all, had this testimony been allowed to go to the jury. It seems to be a matter of judicial discretion.

I take the liberty of quoting to the court from vol. 7, Encl. Evidence, pages 73 and 74: "Where the assailed witness on cross-examination admits having made the variant statement it is likewise proper, in some jurisdictions, to prove such statement by other evidence, although the refusal to permit such proof seems to be harmless error, if indeed error at all. Yet the mere fact that the explanation given by the witness of his admittedly variant statements is satisfactory to the trial judge is in itself no sufficient ground for excluding proof of the variant statements.

"In other jurisdictions, however, such statements cannot be proved by other evidence where the witness admits having made them although the admission of such proof is in Missouri and Wisconsin said to be harmless error."

The next assignment of error is more serious. Instruction No. 2 given for the state, in my judgment is too broad and should not have been given in the light of our decisions. Courts and prosecuting attorneys should be more careful of the rights of persons on trial and not seek to instruct defendant's witnesses out of

court. It is worthy of note that the trial judge who prosecuted in the instant case was the prosecuting attorney whose instructions were condemned in every one of the cases cited by counsel for appellant. I do not think that this instruction could be seriously objected to on the ground that it singles out the witness, see: *Norwood v. Andrews*, 71 Miss. 641; *Cheatham v. State*, 67 Miss. 335; *Thompson v. State*, 73 Miss. 584.

I also invite the court to a reading of the 11th Encl. Pl. and Prac., pages 315, *et seq.*; and also Blashfield's Instructions to Juries, vol. 1, sections 225 and 230.

ANDERSON, J., delivered the opinion of the court.

The appellant was convicted of the crime of malicious mischief, and appeals to this court.

The only eyewitness to the alleged crime, who testified for the state, was one Hollis, who stated that he was in the cemetery about one hundred and fifty yards from New Liberty Church, when he saw the appellant, who was accompanied by the state's witness, his cousin, Tom Lee Neal, break out the windows of the church with a stick; Neal protesting against his doing it. The appellant and Neal both denied that appellant broke out the windows of the church. On cross-examination, the state's witness Hollis testified as follows: "Q. Now, you know Gay Hawkins, don't you? A. Yes, sir. Q. You and Gay were over at Mt. Hermon Church on Sunday after this happened—together over there? A. Yes, sir. Q. On that day, down at the spring, when you and Gay Hawkins were present, when just you and Gay Hawkins were present down at the spring, didn't you say to Gay down there, in discussing this matter, that somebody said you knew who did it, and whoever said that was a liar—that you didn't know anything about it? Didn't you say that to Gay? A. No, sir; I told him I didn't know anything about it." On redirect examination by the district attorney, he testified: "Q. Why did you tell

that? A. I wasn't under any obligation to tell him anything about it."

Appellant offered to prove by Gay Hawkins, in rebuttal, the truth of the predicate thus laid for the impeachment of the state's witness Hollis, which the court refused to permit, on the ground that Hollis admitted substantially what was sought to be proven to impeach him. The record, however, does not bear out this theory. Hollis admitted that he told Hawkins he did not know anything about the appellant breaking out the windows of the church, but denied that he told him some one had said that he (Hollis) knew who did it, but that he knew nothing about it, and whoever said he did was a liar. Had Hawkins been permitted to testify as to the truth of the entire predicate as laid—that part admitted by the witness, as well as that denied—it might have had a material bearing with the jury as to Hollis' credibility. It was error for the court not to permit this to be done.

The giving of the following instruction for the state is assigned as error, viz.: "The court charges the jury, for the state, that they are the sole judges of the evidence in this case, and the jury may believe one witness, and disbelieve any other witness, on the ground of relationship of the witness to the defendant, or for any other reason satisfactory to the jury." This instruction is clearly erroneous. By it the jury were authorized, regardless of the evidence of his credibility, to refuse to believe any witness, on the ground alone of his relationship to the appellant. And they were informed, further, by this instruction, that they could disbelieve any witness "for any other reason satisfactory to the jury." As said by the court in *Riley v. State*, 75 Miss. 352, 22 South. 890: "This is not the law, never has been, and, it is to be hoped, never will be." *McEwen v. State*, 16 South. 242; *Riley v. State*, 75 Miss. 352, 22 South. 890; *Jeffries v. State*, 77 Miss. 757, 28 South. 948.

Reversed and remanded.

99 Miss.]

Brief for appellant.

BOB HARDAWAY v. STATE.

[54 South. 833.]

CRIMINAL LAW. *Appeal to race prejudice. District attorney.*

Where the prosecuting attorney in his closing argument, unrebuked by the court and over the protest of defendant, appealed to race prejudice by suggesting to the jury that they believe the state witness instead of defendant for the reason that the state witness was a white man and defendant was a negro, it was reversible error.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

Bob Harding was convicted of unlawful retailing and appeals.

The facts are fully stated in the opinion of the court.

Bullard & Gavin, for appellant.

The district attorney realized that it was doubtful that the jury would believe an unsupported witness who confessed that he was actuated by motives of revenge or gain rather than the defendant, and to induce them to do so he proceeded to furnish them the reason, or rather motive, that would most likely accomplish this result. That was a direct appeal to race prejudice. "There are four reasons," he said, "why I would believe the state's witness before I would the defendant. In the first place his skin is white while the defendant's is black; he is a white man and the defendant is a negro, and somehow or other it is just natural and inborn in me to believe a white man before I will a negro." The defendant objected and excepted, and the district attorney made it doubly worse by defying his counsel to object to that comparison as often as they pleased. "I have been where you are myself and I know how this

Brief for appellant.

[99 Miss.]

kind of argument hurts." Thus he furnishes himself the reason for the condemnation of what he did. "Object to this comparison as often as you please." What comparison? That of the man with the white skin, and the man with the black skin; the white man and the negro. The truth of the man with the white skin, and perhaps the black heart, and the truth of the man with the black skin, and nothing so far as the record shows, to impeach his heart except his skin, which the district attorney was holding up to their gaze. "I have been where you are and I know how this kind of argument hurts." What argument? The comparison of the skins. And why does he know the argument hurts? Because he knows that the comparison goes home as he intended it should, and as it did. And that is the reason why he made the comparison, he knew that it would hurt. He knew that because of his gravely equivocal attitude, the state's witness needed a prop, or he must take the prop from under the defendant. There was no prop with which he could support his own tottering witness and he proceeded to take the last one from under the other. So he made the deadly comparison, the argument that hurts.

This manner of argument, this manner of appeal to race prejudice, when the invocation ought to be to do justice pure and undefiled, has never, so far as our records show, escaped without its fitting rebuke from this court. Whatever else we may deny the negro, we do give him the same measure of even handed justice we claim for ourselves.

In *Hampton v. State*, 40 So. Rep. 545 and *Harris v. State*, 50 So. Rep. 626, this court sharply condemned such manner of argument and the case of *Tannehill v. State*, 48 So. Rep. 662, is an Alabama case very much like the case at bar. There, as here, the prosecuting attorney invited the jury to disbelieve the defense because it was testified to by negroes, and the supreme court of Alabama rebuked it.

Carl Fox, assistant attorney-general, for appellee.

The state has no argument to make.

SMITH, J., delivered the opinion of the court.

Appellant, a negro, was convicted of the unlawful sale of intoxicating liquor, and appeals to this court.

There were only two witnesses to the fact of the alleged sale—one a white man, introduced on the part of the state, and the appellant, who testified in his own behalf. The case is a close one on its facts. In his closing argument to the jury the acting district attorney, over the protest of appellant, and unrebuked by the court, appealed to race prejudice by suggesting to the jury that they believe the state witness instead of appellant, for the reason that the state witness was a white man and appellant was a negro.

Race prejudice has no place in the jury box, and trials tainted by appeals thereto cannot be said to be fair and impartial. As was said by the supreme court of Alabama, in *Tannehill v. State*, 159 Ala. 51, 48 South. 662: "It is the duty of the court to see that the defendant is tried according to the law and the evidence, free from any appeal to prejudice or other improper motive, and this duty is emphasized when a colored man is placed upon trial before a jury of white men." And by this court, in *Hampton v. State*, 88 Miss. 257, 40 South. 545, 117 Am. St. Rep. 740: "Mulattoes, negroes, Malays, whites, millionaires, paupers, princes, and kings, in the courts of Mississippi, are on precisely the same exactly equal footing." And again by this court, in *Harris v. State*, 50 South. 626: "Every defendant at the bar of his country, white or black, must be accorded a fair trial according to the law of the land, and that law knows no color."

Reversed and remanded.

GEORGE MILLER v. STATE.

[54 South. 838.]

CRIMINAL LAW. *Circumstantial Evidence. Instructions.*

In a case of circumstantial evidence, an instruction for the state that "circumstantial evidence may arise so high in the scale of belief as to generate full and complete conviction beyond a reasonable doubt of defendant's guilt; and if it does rise so high in the scale of belief as to generate full and complete conviction of defendant's guilt beyond a reasonable doubt in the minds of the jury, then they are authorized to act upon it and convict the defendant," is fatally erroneous in failing to add that such evidence should exclude every other reasonable hypothesis than that of defendant's guilt.

APPEAL from the circuit court of Winston county.

HON. G. A. McLEAN, Judge.

George Miller was convicted of larceny and appeals.

The facts as shown by the record are that accused and two others were indicted for grand larceny. The jury acquitted the codefendants. The evidence was entirely circumstantial. On the trial the court granted the following instruction, which is assigned as error: "The court charges the jury, for the state, that circumstantial evidence has been received in every age of the common law, and may arise so high in the scale of belief as to generate full and complete conviction beyond a reasonable doubt of defendant's guilt; and if it does rise so high in the scale of belief as to generate full and complete conviction of defendant's guilt beyond a reasonable doubt in the minds of the jury, then they are authorized to act upon it, and convict the defendants, or either of them, of the crime charged in the indictment."

W. W. Magruder, for appellant.

The instruction for the state on circumstantial evidence was expressly condemned as erroneous in *Williams*

v. *State*, 95 Miss. 671, although the court did not reverse because the error was cured by other instructions. However, in this case there was no other instruction given either for the state or the defendant on circumstantial evidence. The instruction in the Williams case is practically identical except as to phraseology with the second instruction here for the state. The court announced in the William case, "This instruction taken by itself is clearly erroneous. It is elementary law that a conviction may be had on circumstantial evidence alone when by it guilt is proven beyond a reasonable doubt; but it is also elementary that before such conviction can be said to prove guilt beyond a reasonable doubt, it must exclude every other reasonable hypothesis than that of guilt." With this emphatic and ringing declaration from this court as to the danger of such experimental charges to the jury, it is inconceivable that instruction number 2 should have been granted in this case. Doubtless the recent opinion in the Williams case must have been overlooked by the learned trial judge and the district attorney.

Carl Fox, assistant attorney-general, for appellee.

The instruction in the case at bar is attacked on the ground that it does not instruct the jury that such evidence must be sufficient to exclude every other reasonable hypothesis and to satisfy the jury to a moral certainty and beyond all reasonable doubt of defendant's guilt. It seems to me that when the jury are instructed that they must "believe from the evidence (circumstantial evidence), beyond all reasonable doubt," the facts necessary to guilt before they can convict, it is of no practical benefit to add that such evidence must exclude every other reasonable hypothesis.

The court will see, however, upon reading the instruction granted the defendant, that in a great many of them, the defendant himself adopted the theory that if

the jury should believe from the evidence beyond a reasonable doubt that the defendant stole Keeton's hogs, then they should convict. The rule is well established, in civil cases at least, in this court that where the instructions of one party are based upon the same theory as the instructions of the other party, complaint cannot be made here if the theory itself is wrong. *Railroad Co. v. Williams*, 87 Miss. 344; *Railroad Co. v. Boswell*, 85 Miss. 313; *Clisby v. Railroad Co.*, 78 Miss. 937; *Wilson v. Zook*, 69 Miss. 694; *Queen City Mfg. Co. v. Lalack*, 18 So. 800; *I. C. R. R. Co. v. Jones*, 16 So. 300; *Insurance Co. v. Van Os*, 63 Miss. 440; *Insurance Co. v. Van Os*, 63 Miss. 440.

WHITFIELD, C.

The instruction No. 2 for the state is erroneous. It is erroneous for the reasons set out in *Williams v. State*, 95 Miss. 671, 49 South. 513, and since there is no instruction in the case which cures this error, and the case is one of circumstantial evidence, and an exceedingly close case on its facts, the giving of said instruction constitutes reversible error.

We consider no other assignment of error.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the case is reversed and remanded.

H. W. HOYE v. NEWTON LUMBER & MANUFACTURING COMPANY.

[54 South. 839.]

BOOKS OF ACCOUNT. *Secondary Evidence. Witness.*

In a suit upon a verified itemized account where the only question involved was one of overcharge and the items themselves as shown on the copy of the account sued on were not denied in the counter affidavit, it is still true that the question of overcharge involved the books of account and the books themselves are the best evidence and it was reversible error to allow a witness to use the itemized account to refresh his memory and testify that it was a copy of the books when it was not shown that the books themselves were correct.

APPEAL from the circuit court of Newton county.

HON. C. L. DOBBS, Judge.

Suit by Newton Lumber & Manufacturing Company against H. W. Hoyer. - From a judgment for plaintiff, defendant appeals.

This suit is based upon various items of lumber sold by the plaintiff to the defendant and an itemized account is sworn to; the trial having been commenced in the court of a justice of the peace. There was a counter affidavit denying liability, and setting up certain erroneous items and overcharges. On the trial in the circuit court, the books of the plaintiff were not produced; but W. A. Brown, the manager, took the stand and testified as to the correctness of the items shown by the account. He used the sworn itemized account in his testimony to refresh his memory (as is contended), and testified that each item was correct. He testified that he did not know of his own knowledge that the account was correct, as he did not keep the books, but that the account was a copy from the books, and that he knew it was correct, because he knew the books were correct, and that he had

compared the copy with the original account on the books. This testimony was allowed to go to the jury over objection of the defendant, and from a judgment against him this appeal is taken.

W. I. Munn, for appellant.

The testimony here clearly shows that the books of the plaintiff were not introduced in evidence on the trial of this case and that the court permitted the witness for the plaintiff, Mr. W. A. Brown, who was manager of said Newton Lumber & Manufacturing Company to testify as to the correctness of said account by referring to the transcript of the account sued upon and as shown by the sworn itemized account in this case filed by the plaintiff. To this testimony the defendant objected. The undisputed testimony further shows in this case that the witness W. A. Brown, for the plaintiff, could not of his own knowledge testify as to the correctness of the account sued upon and all that he knew about it was that the account sued upon was a true and correct copy of the books of the Newton Lumber & Manufacturing Company. Our contention is that the testimony of the witness, W. A. Brown, is entirely incompetent as it is secondary evidence. *John L. Dyson, Administrator, v. J. J. Baker et al.*; *Chas. A. Pipes et al. v. E. E. Norton*, 47 Miss. 61; *Moody v. Roberts & Co.*, 41 Miss. 75; *Hazlip v. Leggett*, 6 S. & M. 326; *Simmons v. Means*, 8 S. & M. 397; *Moore v. Joyes*, 23 Miss. 584, 47 So. Rep. 644, 48 So. Rep.; 5 Best and Secondary Evidence, No. 164; *Vaughan's Seed Store v. Stringfellow* (Fla.), 410, 46 So. Rep. 1078; *Alabama Iron Co. v. Smith* (Ala.), 475; *Mississippi Digest*, p. 499; *Book of Accounts*; *Pipes v. Norton*, 47 Miss. 61; *Dyson v. Baker*, 54 Miss. 24; *Meridian Fertilizer Factory v. Edwards*, 27 So. 645, 77 Miss. 697.

J. R. Rowzee, for appellee.

We submit that the sole question before this court is whether the testimony of W. A. Brown, was competent. If this court, after taking in consideration the circumstances of this case, decide that the testimony of W. A. Brown is relevant then the appellees must prevail.

We think the learned counsel for plaintiff in the very statement of the case, put himself out of court, that is he fails to bring himself within the principles he is seeking to invoke. He admits that Mr. Brown was not testifying that the books showed the account to be correct, but that he, with his recollection refreshed, knew from personal acquaintance with the transaction that the account was correct and due. It was for the jury to say whether they would believe Mr. Brown's testimony, and as they did believe it this court should not disturb their finding.

We submit that the duties of Mr. Brown as manager of plaintiff's business brought him in actual contact with this transaction; and the undisputed testimony shows that he fixed the price on each and every article sold to defendant. Mr. Brown states in his testimony that he was testifying from his recollection of the transaction as it occurred. In view of these facts, we think the testimony of W. A. Brown was competent. We submit that it was proper for witness to use sworn-to itemized account (the same being in evidence) to refresh his memory as to the original transaction to which he was a party.

We think the case of *Alabama & Vicksburg Railway Company v. Sol Fried Co.*, reported in 33 So. Rep. at page 74, is in point and settled the question involved here.

Argued orally by *Chalmers Alexander*, for appellant, and *J. R. Rowzee*, for appellee.

MAYES, C. J., delivered the opinion of the court.

The testimony of Brown as to what the books showed was clearly incompetent in this case, and should have been excluded. The best evidence was the books, and they should have been produced. If it be true that the only question involved was one of overcharge, and that the items themselves, as shown on the copy of the account sued on, were not denied in the counter affidavit, it is still true that the question of overcharge involved the books, since the copy of the account showed the price per thousand charged for the lumber, and this was denied. If the books had been produced, we cannot say that the contention of appellant that the rate charged for the lumber would not have been shown to be as claimed in the counter affidavit. The proof of the account depended upon the books, and the books should have been produced.

Reversed and remanded.

HETTIE GRIMES v. STATE.

[54 South. 839.]

CRIMINAL LAW. *Acts constituting an assault.*

A party is not guilty of assaulting another with an ax, where he is not in striking distance, nor sufficiently near to put such other in fear of being struck nor prevented by any person or means from striking.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

Hettie Grimes was convicted of an assault and appeals.

The facts are fully stated in the opinion of the court.

D. M. Watkins, for appellant.

There could not possibly have been any simple assault under the evidence, committed by appellant.. Particular attention of the court is called to the decision of this court in the case of *Bailey v. State*, 93 Miss. 79. In that case Bailey was indicted for assault and battery with intent to kill and murder, and was found guilty of simple assault and battery; this court on appeal of the case reversed and remanded because of the absurdity of the verdict.

Jas. R. McDowell, assistant attorney-general, for appellee.

Counsel for defendant claims that if he was not in reach of the prosecutor and did not, as a matter of fact, strike at him, but only drew the ax back, then an assault has not been committed. I submit this is not the law. Drawing a deadly weapon upon another is as much an assault as striking at and missing one. It is not necessary that a blow be delivered. What constitutes a deadly weapon is a question for the jury. (*Saffold v. State*, 76 Miss. 258; *State v. Sims*, 80 Miss. 381.) Certainly, an ax drawn on another is a deadly weapon. The ax might have been thrown or hurled at the head of this witness with just as deadly effect.

ANDERSON, J., delivered the opinion of the court.

The appellant was indicted for an assault with an ax with intent to kill and murder, was convicted of an assault, and appeals to this court.

It is said in 2 Bishop's New Criminal Law, p. 19, §§ 31 and 32: "One who rushes upon his adversary to strike, though not near enough for the blow to take effect, commits the offense (assault) provided he is sufficiently near to create in a person of ordinary firmness a fear of immediate violence unless he strikes in self-defense. . . . There is no need for the party assailed to be put in act-

ual peril, if only well-founded apprehension is created. For his suffering, is the same in the one case as in the other, and the breach of the public peace is the same." Applying this rule to the undisputed facts of this case, it is clear the appellant is not guilty of the charge of which she was convicted. The evidence shows without conflict that the appellant was not in striking distance with the ax of the state's witness Natalie Kelly, nor was she sufficiently near to put her in fear of being struck, nor was she prevented by any person, or other means, from striking. The court below, on the motion for a new trial, should have set aside the verdict, and discharged the appellant.

Reversed and remanded.

NELSON WEBB, SR., ET AL. v. NELSON WEBB, JR., ET AL.

[54 South. 840.]

1. *DEEDS. Fraud. Confidential relation. Cancellation. Consideration.*

Where illiterate parents believing that they were only executing a deed of trust on their lands to raise money to pay off a lien thereon, conveyed their lands to a son, the only consideration being that the son assumed the incumbrance which was much less than the value of the land, and immediately on discovering the fraud which had been perpetrated upon them took steps to cancel their deed, they were entitled to relief.

2. *DEEDS. Confidential relations.*

In such case on account of the confidential relations between the parties the court should scrutinize the transaction more closely than if the transaction had been between strangers.

3. *CANCELLATION OF DEED. Prior incumbrance.*

Where a grantee obtaining a deed by fraud, executes a deed of trust to a third party to obtain money to pay off a prior incumbrance on the land conveyed to him, the grantor as a condition to a decree setting aside the deed to the grantee and the deed of trust, must pay to the third person the amount of the loan so used.

APPEAL from the chancery court of Rankin county.

HON. SAM WHITMAN, JR., Chancellor.

The facts are fully stated in the opinion of the court.

J. R. East, Wm. Buchanan & Patrick Henry, for appellants.

Appellants submit the following authorities in support of their contention that they were entitled to the relief prayed for.

(1) Fraud vitiates everything which it touches. The burden of proof is ordinarily on the complainant, to show by a simple preponderance of evidence that the instrument was obtained by fraud, but the burden shifts when there is either a gross inadequacy of price, or when there is any inadequacy of price, coupled with confidential relations, or any disability. 14 Am. and Eng. Ency. Law, 2d Ed., p. 194, and cases there cited. The burden is on the grantee to prove the transaction fair. *Yarborough v. Harris* (Ala.), 52 So. Rep., No. 14, p. 997; *Hold v. Agnew*, 67 Ala. 360; *Pride v. Baker*, 64 So. Rep. 329; *Hightower v. Huber*, 26 Ark. 611, 76 Miss. 560, 82 Miss. 538.

(2) An absolute deed will be held to be a mortgage, if it clearly appear, that it was designed as a security for money. *R. J. Littleworth, Supt., v. Jane F. Davis et al.*, 50 Miss. Rep. 403.

The old man, Nelson Webb, under the testimony, was twenty-one years old when the war was on, that he cannot read or write, and it is clear he was over-reached by his designing sons, he was made to feel that his homestead was in jeopardy (his mule and cotton having already been seized by Mr. Berry) by the false statements of Nelson, Jr., that Mr. Berry had taken up the bank indebtedness, and was going to sell him out right away, and that there was no time to wait, that it must be fixed right now, thus frightening the old negro into an abandonment of his visit to Brandon to see his lawyer, Mr.

East, and falsely holding out the idea that he was going to protect his homestead and save it for him. "Such a transaction between parties sustaining such relations cannot be sustained, in a court of equity, unless the proof leaves the transaction free from fraud, and undue influence. *Norfleet v. Beall*, *supra*. We refer the court to the case of *Jas. Durr et al. v. J. B. Massingale et al.*, 14 Miss. 500, decided by this court at the March term, 1910.

A. J. McLaurin, Jr., for appellee.

The burden of proving that appellees fraudulently obtained signatures of appellants to the warranty deed is upon appellants. *Taylor v. Buttrick*, 52 Am. St. Rep. 530; *Halls v. Thompson*, 1 Sm. & M. 443.

In the case last above cited Chief Justice Sharkey in delivering the opinion of the court says at page 90, "On the whole then, although there may be some doubts as to the fact of concealments (and there is certainly no more than doubt) the solemn contract of parties cannot be set aside on such uncertain grounds; this should be done on clear proof."

The burden of proof then rests upon appellants to prove the allegations of their bill not only by a mere preponderance of evidence, but by such evidence as would be considered clear proof.

In 6 Cyc., at page 336, we find: "The cancellation of an executed contract is an exertion of the most extraordinary power of a court of equity which ought not to be exercised except in a clear case and never for an alleged fraud unless the fraud be made clearly to appear." And the cases there cited fully bear out the proposition.

No fiduciary relation exists between appellants and their two sons as to throw the burden of proving the *bona fides* on appellees. The nearest approach to claiming the existence of such relation is found in the following, taken from appellant's brief: "The law we submit throws around appellants the aegis of its protection

against the false and fraudulent subtleties and machinations of the sons." The law throws the aegis of its protection around appellants against the fraud of every one, but does not take allegations of fraud as proof of it.

The mere fact of a relationship of parent and child shown to exist does not show any fiduciary relationship; whether or not such relationship exists depends on the facts of each case. *Studybaker v. Cofield*, 61 S. W. 246, 159 Mo. 596.

MAYES, C. J., delivered the opinion of the court.

On the 24th day of April, 1909, the complainants were the joint owners of a tract of land containing about one hundred and fifty acres. On the above date they executed a deed in trust on same for the sum of about five hundred and forty-eight dollars in favor of the Citizens' Bank of Brandon. It seems from the testimony that during the year 1909, and previous to this controversy, somewhat more than sixty dollars was paid on this deed in trust by complainants to the Citizens' Bank. On the 8th day of November, 1909, Nelson Webb, Sr., and his wife, Julia Webb, complainants and appellants, executed a deed to all of the real estate to their son, Nelson Webb, Jr. The deed is a simple warranty deed, reciting a consideration of five hundred and thirty-eight dollars, which the deed purports to have been paid, so far as anything to the contrary appears on the deed. On the 30th day of December, 1909, and only a few weeks afterwards, Nelson Webb, Sr., and his wife, Julia, filed a suit against their son, Nelson Webb, Jr., Henry Webb, and W. G. Cooper, the object of which was to cancel the deed made by Nelson Webb, Sr., and his wife, to Nelson Webb, Jr. The reason Cooper was made party to the suit was that, immediately after Nelson Webb, Jr., obtained the deed to the land in question, he gave a deed of trust on the land to W. G. Cooper for the sum of four hundred and forty-one dollars and ten cents. Henry Webb, the other

son, is made a party, because it is alleged that the transaction was fraudulent and Henry participated in it. The trust deed in favor of Cooper was executed on the 10th day of December, 1909, and was executed by Nelson Webb, Jr., and his wife, Sarah Webb. In the bill seeking to cancel the deed made to Nelson Webb, Jr., the complainants offer to pay into court the amount of money necessary to settle what may be due under the deed in trust to the Citizens' Bank.

The bill charges that the sons, Nelson and Henry, entered into a conspiracy for the purpose of defrauding complainants of the property in question, and in pursuance of this conspiracy falsely and fraudulently represented that one R. G. Berry, a merchant at Florence, had bought from the Citizens' Bank the trust deed held by the bank; that, if the complainants would give them a trust deed on the land, they would get the money to take up the indebtedness; that they could get the money from a negro bank in Jackson at four per cent for a short time, and five for a year. It is charged in the bill that complainants are old and ignorant, and unable to read and write; that the defendants Nelson and Henry are their sons; that these sons represented that their home was in jeopardy on account of Berry's purchase of the trust deed from the bank, and having confidence in their sons; and, believing their home in jeopardy, that they signed an instrument at the request of Nelson Webb, Jr., which they believed to be a deed in trust, believing at the time that they signed only a trust deed for the purpose of raising the money to pay the claim held by the Citizens' Bank. Shortly afterward they learned that the instrument signed was not a trust deed, as had been represented by their sons, but was in fact a deed to their son, Nelson Webb, Jr. The bill charges that complainants never intended to sign a deed, did not know that they were signing a deed, and would not have signed the deed for so inadequate a price, as the land was easily worth

fifteen hundred dollars. The bill charges that the debt to the Citizens' Bank has been paid; that Nelson Webb, Jr., claims to be the owner of the land, and had executed the trust deed to W. G. Cooper. It is charged that, as soon as the complainants were advised of this, they charged Nelson Webb, Jr., with the fraud, and tendered a sufficient amount of money, through their attorneys, to pay the amount of the indebtedness, and demanded a reconveyance of the land, which the son refused to make. All of the defendants answered, and denied all the substantial allegations of the bill. It is shown by the answer that the amount secured by the trust deed and owing to the Citizens' Bank was paid, and that the money to discharge the debt was obtained by Nelson Webb, Jr., from W. G. Cooper; and that the trust deed executed by Nelson Webb, Jr., and wife, on the property in question, to Cooper, was for the purpose of securing money to discharge the deed in trust executed by Nelson Webb, Sr., and his wife, on the land, in favor of the Citizens' Bank.

It is manifest from this record that this whole transaction, so far as the sons are concerned, is a swindle and a fraud. The only consideration paid by them to this old couple was simply the assumption of the debt due from their parents to the Citizens' Bank, and for this getting a tract of land much more valuable than any amount it would take to pay the debt on it. Complainants say that at the time they made the deed to the son they thought they were only executing a deed in trust to raise money to pay the bank, and every fact and circumstance in the case indicates that this is true. At the date of the transaction they owned and were living on the property. It is true that there was a mortgage on it, but the holder thereof seemed satisfied with the security held. Mr. Cooper did not hesitate to loan enough on the property to these fraudulent grantees to pay off the debt due the bank or at least nearly enough, thus showing that the property was worth much more than the debt.

Everything that this old couple could have gotten out of the transaction, so far as this testimony shows, and the circumstances strongly indicate, was to be turned out of their home for the assumption of the debt on same by the son, when the home itself was more than ample security for the debt. The son had not given one dollar to either of these parents for this deed. According to the testimony of some of the witnesses, the property is worth nearly three times as much as the debt; according to others, it is worth only a few hundred dollars more; but no witness states the value of the property to be less than the debt. Every fact and circumstance in the case proves fraud.

Considering the relationship of the parties, this transaction is to be even more closely scrutinized than if it had taken place between strangers. The value of the property is in excess of the debt, the deed was procured to be made by the sons of the complainants, these sons stood in a confidential relation toward their parents, and it was easier for them to play upon their credulity and to impose upon them than it would have been if by a stranger. Immediate steps were taken to cancel the deed in question.

Under the facts of this case, the complainant's bill should have been sustained, after requiring them to pay to Cooper whatever is due under the deed in trust held by him; the money having been used to pay off the amount due the Citizens Bank. The deed made to the son is no more than a voluntary deed, without consideration to support it. The parents gave all; they got nothing.

We think the decision of the chancellor on the facts of this case is manifestly erroneous. It should have taken but slight testimony, in view of all the circumstances, to cause the chancellor to set aside this transaction; and, because he did not, the case is reversed and remanded.

Reversed and remanded.

T. A. LITTLE v. CREEK LUMBER COMPANY.

[54 South. 841.]

CORPORATION. *Deeds. Seals. Ejectment. Legal Title. Code 1906, sections 901, 2766, 4631.*

Under Code 1906, section 901, section 2766 and 4631 authorizing corporations to adopt a seal and to convey land under the corporate seal and abolishing the distinction between sealed and unsealed instruments made by private persons, a deed to land by a corporation made in this state, not under its corporate seal does not convey the legal title and cannot be availed of in an action of ejectment where the plaintiff must have the legal title.

APPEAL from the circuit court of Forrest county.

HON. W. H. COOK, Judge.

Ejectment by T. A. Little against Creek Lumber Company. From a judgment for defendant, the plaintiff appeals.

The appellee sold a lot to one Steadman, who afterwards conveyed to appellant, Little. Appellant claiming certain tenement houses on the land, which appellee asserts were to be reserved, an action of ejectment was instituted by appellant against appellee. On the trial, appellant offered in evidence the deed executed by appellee to Steadman; but same, not being under the corporate seal of the appellee, a corporation, was excluded on objection of appellee, and a peremptory instruction given to find for appellee.

Currie & Currie, for appellant.

We put this proposition to counsel for appellee, and call on them to answer it. Under our Code chapter on corporations, could a corporation be legally required and compelled to adopt and have a seal? Section 901 simply provides: "May have a corporate seal."

Our intention is that this provision is merely directory, and that a corporation organized and chartered under our chapter may or may not as it elects adopt and have a seal.

Under the common law before the use of the seal was abolished and before the enactment of our statutes relating to the use of the seal, such a person could have required by legal proceedings, or absolutely compelled by order of court, the adoption of a seal and the affixing of it to the supposed deed, but at that time a crooked mark, flourish of the pen or scroll—anything most—would have complied with the order.

Not only has it been the general and uniform trend of legislation and the decisions of courts to get away from the use of the seal, but the general business custom has been to dispense with them, and we dare say our state has in it many deeds to land executed by corporations which do not bear the private corporate seal, and our statutes should be held directory on the grounds of public policy.

In every single case in our state where a question has been before our court, since the Code of 1880 went into effect, so far as we have been able to ascertain, involving the necessity of the use of the seal, the court has decided against it.

In *Lumber Company v. Cain*, 70 Miss. 628, the court held that a corporation could convey its property without the use of its seal.

In *Brown v. British Company*, 86 Miss. 388, the court held that the written appointment of a substituted trustee in a deed of trust to sell land in which a corporation was beneficiary need not be under seal.

In the case of *Alice McIver v. J. V. Abernathy et al.*, 66 Miss. 79, the court held that a conveyance of the land of an incorporated bank executed by its officers, where the purchase money is paid, passes the equitable title, without the use of a corporate seal.

N. C. & C. E. Hill, for appellee.

We respectfully call the court's attention to the case of *Gibbs v. McGuire*, 76 Miss. 646, which was an action of ejectment. The plaintiff in this case, in proving his chain of title, introduced a deed not under seal. The deed was executed by a private individual in the state of Texas, under whose laws the deed of a private individual required no seal, about nine months before the Code of 1880, which abolished seals as to individuals, went into effect. Objection was made by the defendant to the introduction of the deed and the objection was sustained. We call the attention of the court to the fact that in this case the statute abolishing seals as to individuals had already been enacted, but the Code had not yet gone into effect. Yet so strict was the law in its requirements of the individual seal that the court held the deed in question without the seal absolutely void and plaintiff failed to sustain its action of ejectment.

We are unable to find among the numerous authorities cited on this question any state decision which dispenses with the use of the seal in the conveyance of real estate by a corporation, especially in an action of ejectment where a complete legal title is necessary to sustain the action. We find plenty of authorities showing the necessity for the use of the seal, but will not set the decisions out here at length. For cases in point see *American Digest*, Century Edition, vol. 12, columns 1828 and 1829, section 1781, showing decisions from numerous states requiring the use of the seal by a corporation in the conveyance of its real estate. Also the following well-known authorities on corporations: *Cook on Stock and Stock-Holders and Corporation Law*, 3d Ed., vol. 2, §§ 721-722, and *Marshall on Corporations*, p. 240 *et seq.* Mr. Marshall is a recognized authority on corporations and this text is the one used in our own state university. Twice does this author say that a conveyance of real

estate by a corporation must be under the corporate seal.

The other errors assigned by appellant cannot be considered in this case. The only question to be decided here is whether or not the corporate seal is essential to the validity of a deed by a corporation. It has been repeatedly held in this state that in order to sustain an action of ejectment plaintiff must rely on a complete and perfect legal title. *Thompson v. Wheatly*, 5 Smed. & M. 499; *Wolfe v. Dowell*, 13 Ib. 103; *Torrance v. Betsy*, 30 Miss. 129; *Heard v. Baird*, 40 Ib. 793; *Lockhart v. Camfield*, 48 Ib. 470; *Gibbs v. McGuire*, 70 Miss. 646.

WHITFIELD, C.

The question upon which the decision of this case pivots is whether a deed to land, made by a private corporation without affixing its corporate seal thereto, is valid in an action of ejectment at law. It was undoubtedly the rule at common law that a private corporation could not convey its real estate, except under its corporate seal. In *Perry v. Price*, 1 Mo. 664, 14 Am. Dec. 316, the court said: "Those things do not exist in this case, nor does the approbation of seven directors afterwards, ratifying the execution of the writing, as they call it, make the matter any better. They only ratify the execution of the writing. This ratification does not make the instrument a deed, unless it were a deed before. It does not make a smooth plaster of wax a sealed impression. These things, we know, are technicalities; but it is to be remembered that a corporation only exists by technical fiction, and all it does must be technical, and, in general, can only be known by using signs, which the law has given it power to use, to evince its existence or consent. We do not think there is any analogy between the cases of sealing by individuals and corporations. In the case of a natural person, there is but one will to be proved; but in the case of aggregate corporations there are many

natural wills, and they must be conjoined before any corporate will is produced; and this conjunction is to be proven by proof of the common or special sign of consent having been given. In the case of a natural person, the fact that any seal was used by him is proof that his whole will concurred in assent to the act done. Therefore the analogy fails."

Section 901 of the Code of 1906 provides that every corporation created under the chapter on "Corporations" may have a "corporate seal" and may "sell and convey real estate." Section 2766 of the Code of 1906, in the chapter on "Land and Conveyances," provides that "corporations may convey their lands by and under corporate seal and the signature of an officer," etc. Section 4631 of the Code of 1906, which first appeared as section 993 of the Code of 1880, provides: "The use of private seals is dispensed with, except as to corporations; and all distinction between sealed and unsealed instruments, made by private persons, either as to the rights conferred by them or the remedies on them, is abolished."

In the case of *Gibbs v. McGuire*, 70 Miss. 646, 12 South. 829, a deed was made to land in this state by an individual living in Texas, on the 20th day of January, 1880, nine months before the Code of 1880, by which seals were abolished as to individuals, became operative. At that time the law of Texas did not require a seal to such a deed, and the court held that the deed was void, and unavailable in an action of ejectment, because the law at that time had not been changed by section 993 of the Code of 1880. The court said: "While the power of the legislature to have so legislated as to give effect to unsealed conveyances according to the intention of the parties is admitted, we find no evidence of any such purpose in the law. It does not declare a rule for the past, but for the future; and, having abolished the use of seals, it at the same time abolished those distinctions

which had previously existed in reference to remedies which rested upon the existence of seals. But there is nothing to indicate that a different effect was to be given to an instrument previously executed than it had at the time of its execution. The one introduced by the plaintiff was confessedly insufficient to convey the legal title to the land when it was made. *Alexander v. Polk*, 39 Miss. 737. And the plaintiff, suing in ejectment at law, must recover upon a legal title. *Thompson v. Wheatley*, 5 Smedes & M. 499; *Wolfe v. Dowell*, 13 Smedes & M. 103, 51 Am. Dec. 147; *Torrance v. Betsy*, 30 Miss. 129; *Heard v. Baird*, 40 Miss. 793; *Lockhart v. Camfield*, 48 Miss. 470."

This case is conclusive here, since this also is an action of ejectment, and, so far as private corporations are concerned, section 993 of the Code of 1880 and section 4631 of the Code of 1906 expressly except corporations. There is no escape, therefore, from the conclusion that a deed of a private corporation, made at this time in this state, to land, cannot be availed of in an action of ejectment, where the plaintiff must have the legal title, if that deed be not under seal. Such is the effect of our statutory law in this regard. So far as the case of *McIver v. Abernathy*, 66 Miss. 79, 5 South. 519, is concerned, it is only necessary to say that that was a suit in equity, and the case has no application here.

The case of *Morgan v. Blewitt*, 72 Miss. 909, 17 South. 602, settles this proposition squarely. The court there said: "In ejectment, in a court of law, only the legal title is involved, and equitable defenses are inadmissible. There may be cases where it would be very convenient and advantageous, and would seem to be proper, to permit an equitable defense in a court of law in resistance of an action to recover land; but the difficulty of drawing the line between cases where such defense may or may not be allowed suggests the wisdom of denying it in all cases and leaving parties to the appropriate forum of

the assertion of equitable rights; and so long as the state maintains two sets of courts to administer justice, where one would do it better, and without questions as between law and equity, it is the duty of the court to maintain the distinction between legal and equitable rights and remedies, and that each shall avoid any invasion of the province of the other. This will prevent confusion, and preserve the constitutional scheme of two sets of courts. However desirable it may be to have one court, about which there can be no mistake or dispute, to administer whatever justice the jurisprudence of the commonwealth affords in each case, without dismissing a party to seek some other tribunal, the courts are unable to accomplish this, and must uphold existing arrangements, and each court must continue to administer the principles applicable to it, and not lengthen its arm to seize what belongs to the other. Each court must complacently recognize its impotence to give relief in many cases, and dismiss a party to seek it elsewhere in the state's temple of justice, but in another apartment."

Affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is affirmed.

STATE v. KATIE JAMISON.

[54 South. 843.]

1. CRIMINAL LAW. Code 1906, section 1377. *Threatening letter. Demurrer.*

A demurrer to an affidavit charging the sending of a letter as shown in this case was properly sustained, the letter on its face not containing any threat within the meaning of section 1377, Code 1906.

2. DEMURRER.

In passing on a demurrer the court is confined to, and cannot take into consideration matters *aliunde* the record.

APPEAL from the circuit court of Yazoo county.

HON. W. A. HENRY, Judge.

Katie Johnson was charged with sending a threatening letter. She demurred to the affidavit and her demurrer being sustained, the state appeals.

The following affidavit was filed against the appellee, being accompanied by a letter made a part thereof: "Before me, W. J. Royster, a justice of the peace of said county, in justice district No. 3, H. T. Whadley, who makes affidavit on information and belief that Katie Jamison, on or about the —— day of August, 1908, in the county aforesaid, in said justice's district, did willfully and unlawfully send, deliver, and drop a threatening letter, a copy of which is filed herewith and made a part hereof, to one Jane Laws, with intent then and there to terrorize and intimidate the said Jane Laws, against the peace and dignity of the state of Mississippi."

The letter is as follows: "Well, Jane, you have succeeded in throwing me out of the money on Uncle Mitchell. I hope you are satisfied, and you and your husband will stop running around saying all manner of low down things about me. You could not get it. You

would not let me have it. I was not willing to go to law for it. I have long learned that lawsuits will not do any good. The dirty things that you and West have done and said will cost you more than seven hundred dollars. I learned that you had killed one child by your acts. Your brothers all died terrible deaths. You told me that your father was worked and beat to death by your husband. West told me that Uncle Mitchell would carry notes from men to his own granddaughter, for whiskey, then go off from the house and leave the man and the girl there. He says he told you to slap that baby on your side and get up from there and run around to keep me from that money; for you could not get it and I should not have it. You seemed to have done so, and hit it so hard until you killed it and got it out of your way, and still I learn that you are still telling all kinds of tales, saying that your own father was crazy. I would speak well of the dead. West and you will stop after a while I hope. You will get out of the N. L. of H., I hope, and not be turned out. You should stay out until you get through the lawsuits. I will not have any lawsuit. I will let you rule it, and pay the debt, as you would not let me get what was mine. Now, Jane, I ask you to get your husband to stop saying all of those low dirty things about me. I learned that he cursed me. I thought I would make a charge against him in the Masons as soon as you end these lawsuits. I want you both to have your way first, and get satisfied. [Signed] K. B. Jamison."

A demurrer was filed to the affidavit, which set out that "the letter claimed to have been delivered and made a part of the affidavit by defendant is not a threatening one in the meaning of the law, and the affidavit, therefore, charges no crime." The court sustained the demurrer, and the state appeals.

The statute under which the affidavit is drawn is as follows:

Brief for appellant.

[99 Miss.]

“1377. *Threatening Letter or Notice*.—If any person shall post, mail, deliver, or drop a threatening letter or notice to another, whether such other be named or indicated therein or not, with intent to terrorize or intimidate such other, he shall, upon conviction, be punished by imprisonment in the county jail not more than six months, or by fine not more than five hundred dollars, or both.” Code of 1906.

Holmes & Holmes, for appellant.

The affidavit was framed under, and was intended to charge a violation of section 1377 of the Mississippi Code of 1906.

What is a threatening letter or notice, however, does not always appear on the face of the letter or notice itself. That is, language may seem mild and inoffensive, and, indeed, meaningless, to one for whom the language was not intended, or to one who is ignorant of the relations of the parties between whom the communication passed, or to one who is in ignorance of the motives, purposes, and intentions, which prompted the sending of the communication, but the same language may become the vilest threat in the light of a full explanation of the relation of the parties and all the circumstances surrounding them. When an affidavit, therefore, framed under section 1377, alleges directly that the letter was a threatening letter, it is an arbitrary thing for the court, on demurrer (the demurrer, admitting as it does the truth of the allegations contained in the affidavit) to sustain the demurrer, and refuse to hear evidence which may show the threatening character of the letter alleged to have been sent. And yet, this is what the court did in this case. The affidavit charged directly that the letter alleged to have been sent was a threatening letter. The defendant's demurrer to the affidavit admitted that it was a threatening letter.

We think, however, that the letter herein complained of, is a threatening letter on its face, but he who differs with us in this opinion will have scant reason for doubt when placed in possession of the facts which show the relations of the parties concerned, the circumstances surrounding them, and the differences existing between them.

But the letter does not stop here. Another threat follows in language which is more significant when we remember that the defendant is Grand Protector of the "N. L. of H." over the state of Mississippi, and wields a high authority in that order. Note the following:

"You will get out of the N. L. of H. I hope and not be turned out." Jane was a member of this order, and such language from the superior officer of the society could have but one meaning construed in the light of the circumstances of this case—unless you get out, you will be turned out.

We submit, therefore, that the court should have overruled defendant's demurrer, and permitted the introduction of proof in support of the allegations contained in the affidavit.

SMITH, J., delivered the opinion of the court.

The court committed no error in sustaining the demurrer to the affidavit. The letter on its face contained no threat, within the meaning of section 1377 of the Code.

It is contended, however, by counsel for the state, that the letter, construed in the light of certain evidence, which would have been introduced on the trial, did contain a threat within the meaning of this section. All this may be true, and still the situation is not altered; for the affidavit contained no allegation submitting any such construction of the letter to the court. In passing on the demurrer, the court is confined to, and cannot take into consideration matters *aliunde* the record.

Affirmed.

G. E. WILSON v. TOWN OF HANDSBORO.

[54 South. 845.]

1. CRIMINAL LAW. *Correction of judgment. Code 1906, section 1016.*

Section 1016, Code 1906, providing for correction of errors in judgments applies only to civil not to criminal cases.

2. SAME.

This section refers alone to corrections of mistakes in "miscalculation or misrecital of any sum of money or quantity of anything, or any name" and is not applicable to case where the effort is to entirely change the judgment incorrectly entered on the minutes by the misprision of the clerk, to a totally different judgment which had been actually rendered by the court. The power to do this is not derivable, either in civil or criminal cases from this section.

3. JUDGMENT. *Power to correct.*

Power to correct a judgment rendered at a former term, not in some clerical matter merely, as to name or amount, but so as to strike out a judgment erroneously entered by mistake of the clerk, and substitute for it the wholly different judgment actually rendered by the court is a power inherent in every court of record and not derived from any statute.

4. JUDGMENT. *Correction. Evidence.*

On a motion to correct an erroneously entered judgment, any evidence of parol, or other kind, is competent, which throws material light on the truth of the matter, but where there is nothing but mere parol evidence, such evidence should be very carefully and closely scrutinized.

APPEAL from the circuit court of Harrison county.

HON. T. H. BARRETT, Judge.

G. E. Wilson was convicted of failing to work the streets of the town of Handsboro and appeals.

This is an appeal from a conviction for the failure to work the streets of a municipality. The case on former appeal is reported in 50 South. 982. It is contended on this appeal that the court below should have sustained

the motion to discharge defendant, because no replication had been filed to the plea of former jeopardy. The record shows that there was a demurrer introduced to this plea, which the court sustained at a former term, but the judgment, through some error, showed that the demurrer was overruled, and that at a subsequent term of the court an order was entered correcting the erroneous judgment. With this demurrer stricken out, the case then proceeded to trial on its merits, resulting in a conviction, from which an appeal is taken. Among other errors assigned, there is presented for review the question of the authority of the court at a subsequent term to correct an error in a judgment entered at a former term.

E. M. Barber, for appellant.

My contention being that the court at a subsequent term had no authority to change the minutes of a former term wherein the demurrer had been overruled and making an order sustaining same.

"A plea of former jeopardy" is a "plea in bar" and the demurrer, of course, confessed the facts set up in the "plea in bar," and when the minutes of the court showed that the demurrer had been overruled, at the expiration of that term of the court, that was a final judgment in behalf of defendant. *George's Digest* 585, Demurrer to Plea; *Bailey v. Gaskins*, 6 H. 519; *Lang v. Fatheree*, 7 S. & M. 404; *Shields v. Taylor*, 13 S. & M. 127; *Hardin v. Pelam*, 41 M. 112.

Jas. R. McDowell, assistant attorney-general, for appellee.

It is contended that the court should have sustained the motion to discharge the defendant because no replication had been filed to the plea of former jeopardy. As a matter of fact, there was a demurrer introduced to this plea which the court sustained at a former term, but

the judgment through some error showed that the demurrer was overruled. At the next term, the court entered a judgment correcting the error. Counsel contends that the court is without authority at a subsequent term to correct such an error in such a judgment. On the former trial, this point was not determined by the court and is raised now in this trial. This not being a final judgment, can be corrected at a subsequent term.

By reference to 17 Am. and Eng. Ency. Law, 2d Ed., p. 816, your honors will see that the rule is that, after the expiration of the term, the court is without power to amend a judgment in any matter of substance or relating to the merits of the cause.

“GENERAL RULE: It is a power inherent in the authority of every court having general jurisdiction, to correct errors in the making up of records, whereby they fail to express the truth in regard to its proceedings, and this power can be exercised by the court at any time when an error is brought to its attention, when no injury is likely to result to the parties or other persons by its exercise. Therefore the court may at any time, even after the expiration of the term at which a judgment was entered, correct or amend the entry thereof so as to make it conform to the judgment which the court actually rendered.”

Here the judgment failed to express the truth in regard to the proceedings and, of course an error could be corrected. No court would permit the error to stand in the record if it militated against the defendant. Then why should the defendant ask to take advantage of this error. His rights could not be affected by the correction, and the state is entitled to have the record express the truth.

Our own court in *Le Blanc v. I. V. Railroad Co.*, 73 Miss. 463, has so expressly held; and I deem it unnecessary to prolong the argument on this point. This point is fully covered in the admirable brief of Hon.

George Butler in case No. 13883, to which I refer the court.

WHITFIELD, C.

The effort here is to have the court correct a judgment rendered at a former term, which judgment recited that the demurrer to a plea of former jeopardy had been overruled, by showing that in truth and in fact the demurrer had been sustained, and that the mis-entry was due solely to a clerical omission by the clerk. In other words, the effort is to make the record speak the truth, to recite the judgment which the court actually rendered, instead of a judgment the direct opposite of the one which the court had actually rendered.

This is a criminal case. Consequently section 1016 of the Code of 1906, which is section 940 of the Code of 1892, has no application. See *McCarthy v. State*, 56 Miss. 294. Some of the earlier authorities in this state on power of the court to correct a judgment rendered at a former term, so as to make it speak the truth, are collected in this case. All of them may be found set out in note 1 at page 99 of the first volume of Freeman on Judgments. It is undoubtedly true that these earlier authorities hold that no such correction could be made, even by resort to memoranda made by the judge. This was found to be entirely too harsh a rule, and so in the progress of our jurisprudence section 940 of the Code of 1892 was passed, which expressly provided that "such correction could be made by the docket or other memoranda by the judge or chancellor." This clause of said section 940 was intended to change, and, of course, did effectually change, the rule that the docket or memoranda of the judge could not be used as the evidence whereby to make such correction. But this section 940 of the Code of 1892 (section 1016 of the Code of 1906) relates only to civil cases.

Another most important observation is due to be made just here, and that is that section 1016 refers alone to corrections of mistakes in "miscalculation, or misrecital of any sum of money or quantity of anything, or of any name," and that such section is not applicable, consequently, to a case where the effort is to entirely change the judgment, incorrectly entered on the minutes by the misprision of the clerk, to a totally different judgment, which had been actually rendered by the court. Whenever the effort is to do this latter thing, to change entirely a judgment from the one entered on the minutes by the mistake of the clerk to one wholly different actually rendered by the court, the power to do so is not derivable, either in civil or criminal cases, from said section 1016, or from any other statutory enactment, but is a power inherent in all courts of record. Says Mr. Freeman in section 71, vol. 1, on Judgments: "All courts have inherent power to correct clerical errors at any time, and to make the judgment entry correspond with the judgment rendered. This power exists in criminal prosecutions as well as in civil cases." And again he says: "In whatever respect the clerk may have erred in entering judgment, the court may, on proper evidence, nullify the error by making the judgment entry fully and correctly express the judgment rendered." And he cites, among other cases, the case of *Morrison v. Stewart*, 21 Ill. App. 113, where the judgment was changed from a judgment for the plaintiff to a judgment for the defendant. Says Mr. Black, in his work on Judgments (section 161): "This power, being inherent, belongs to a court merely as such, and does not depend upon a statutory grant of jurisdiction." In the case of *King v. State Bank*, 9 Ark. 188, 47 Am. Dec. 739, the court says: "As to the power of the court below to allow the amendment in question, there can be no doubt at all. The authority of the court, in such cases, does not arise from the statute of amendments, and jeofails, although this

statute controls in cases of amendment after writ of error brought, but from the high equity powers of the court, which enable it to amend in whatever may be necessary to make the record speak the truth, whenever the ends of justice require such amendment." See *Hart v. Reynolds*, referred to in *Chichester v. Cande*, 3 Cow. (N. Y.) 44, 15 Am. Dec. 238.

In *Mars v. Quin*, 6 Term R. 8, Lord Kenyon, C. J., says: "The forms of the court are always best used when they are made subservient to the justice of the case." And Ashhurst, J., observed: "It is admitted that amendments have been made at all times in order to forward the justice of the case." In that case the court put the judgment *forti manu* two years back to prevent injustice, because it could not injure third persons. In *King v. Mayor of Grampond*, 7 Term R. 699, Lord Kenyon says: "I wish that that could be attained that Lord Hardwicke, in the case before him, lamented could not be done, namely that these amendments were reduced to certain rules; but, there being no such rules, each particular case must be left to the sound judgment of the court. And the best principle seems to be that on which Lord Hardwicke relied in that case, that an amendment shall or shall not be permitted to be made as it will best tend to the furtherance of justice. Amendments of this kind are not made under the statute of jeofails, but under the general authority of the court."

We think it is perfectly clear that this power, with which we are dealing, the one to correct a judgment rendered at a former term, not in some clerical matter merely, as to name or amount, but so as to strike out a judgment erroneously entered by mistake of the clerk, and substitute for it the wholly different judgment actually rendered by the court, is a power inherent in every court of record, and not derived from any statute. There seems, indeed, to be no controversy as to the right to exercise this power. In this state, in the case of *Forbes v.*

Navra, 63 Miss. 1, it is distinctly upheld, citing *Cotten v. McGehee*, 54 Miss. 622, and *Freeman on Judgments*, § 71. The case of *Cotten v. McGehee* is our leading case on the subject, where the matter seems to have been fully considered, and in the last announcement by this court on this subject, in *Powers v. State*, 83 Miss. 697, 698, 36 South. 6, the doctrine is distinctly announced in a precisely analogous case to the one at bar. That was an indictment for murder, and the case had been reversed and remanded by this court, and after the remanding of the case the defendant filed a special plea of former jeopardy, just as was done here, and that plea was actually overruled at the term at which it was presented, but by oversight no order was placed on the minutes of that term showing the disposition of the plea. The court allowed an order to be then placed upon the minutes showing the disposition of the plea as made at the previous term, and this court said that was correct.

The very best and clearest authority we have seen upon this subject is the case of *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 190, 191. In that case the court said:

“Every court exercising a continuing jurisdiction, having an office for the preservation of its records, and the charge of those records by a proper officer, has by law an implied authority to amend its records, to make them conform to the facts and truth of the case. *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316; *Dudley v. Butler*, 10 N. H. 284; *Willard v. Harvey*, 24 N. H. 344; *Claggett v. Simes*, 31 N. H. 23. Or, as the same doctrine is well expressed by Fletcher, J., in *Balch v. Shaw*, 7 Cush. (Mass.) 284, there can be no doubt that it is competent for a court of record, under its general inherent and necessary authority, to correct the mistakes and supply the defects of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case. And this may be done at any time, as well after as during the term. The length of time in this case

(12 years) between the granting of the license and the making up of the record does not take away the right or jurisdiction of the court. *S. P. Fay v. Wenzell*, 8 Cush. (Mass.) 317; *In re Limerick, Petr.*, 18 Me. 186; *Lothrop v. Page*, 26 Me. 121; *Woodcock v. Parker*, 35 Me. 138; *Lewis v. Ross*, 37 Me. 234, 59 Am. Dec. 49; *Weed v. Weed*, 25 Conn. 337; *Chichester v. Cande*, 3 Cow. (N. Y.) 39, 15 Am. Dec. 238; *Hunt v. Grant*, 19 Wend. (N. Y.) 90. This authority not only extends to the correction of clerical errors, but to the restoration of papers which have been improperly altered or defaced, and the substitution of new ones where the originals are purloined or lost. *Douglas v. Yallop*, 2 Burr. 722; *Hollister v. Judges*, 8 Ohio St. 201, 70 Am. Dec. 100.

“It is contended, and so are some of the authorities, that an amendment of a record cannot be made unless there is something to amend by, by which is understood something upon the files or records of the court. *Wendell v. Mugridge*, 19 N. H. 112; *Atkins v. Sawyer*, 1 Pick. (Mass.) 354, 11 Am. Dec. 188; *Grenville v. Smith*, Cro. Jac. 628; *Mason v. Fox*, Cro. Jac. 632. But in other cases such amendments have been made according to the minutes of the judge. *Coughran v. Gutcheus*, 18 Ill. 390; *Brady v. Little*, 21 Ga. 132; *Petrie v. Hannay*, 3 Term R. 659; 1 Tidd’s Pr. 661; *Newcombe v. Green*, 1 Wils. 33, 2 Str. 1197; *Eddowes v. Hopkins*, 1 Doug. 376; *Tarleton v. Fisher*, 2 Doug. 672. Here we have the minutes of the judge, and counsel entirely clear upon the point. But we think it clear, upon the authorities, that the court may make such amendments upon any competent legal evidence, and that they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or the actual proceeding before it—what was the proper entry to be made on the docket, and how the record should be extended. *Fay v. Wenzell*, 8 Cush. (Mass.) 317; *Balch v. Shaw*, 7 Cush. (Mass.) 284; *In re Limerick, Petr.*, 18

Me. 186; *Weed v. Weed*, 25 Conn. 337; *Hollister v. Judges*, 8 Ohio St. 201, 70 Am. Dec. 100, before cited. Where there is nothing more to rely on than mere memory, the court will act, if at all, with great caution. *Porter v. Vaughan*, 22 Vt. 273; *Coughran v. Gutcheus*, 18 Ill. 390."

See, also, Freeman on Judgments, vol. 1, §§ 70, 71; Black on Judgments, vol. 1, §§ 161, 165. See, also, 30 Century Digest, Judgment, § 623. These authorities certainly settle beyond controversy the power of the court at a subsequent term to so correct a judgment, entered by mistake of the clerk at a former term incorrectly, as to make it speak the truth, by then entering up the true judgment actually entered at the former term by the court.

The remaining question is, simply, What evidence is it competent for the court to hear on such motion? As stated, in the earlier decisions of this court, referred to *supra*, most of which, however, were in civil cases, it was held that no parol evidence, nor any evidence, except record evidence, was competent. But in the *Navra* case, just cited, and in *Cotten v. McGehee* and in *Powers v. State*, this rule was manifestly departed from. In the *Navra* case, there was no evidence at all; but the court acted upon the presumption that the judge had directed the proper judgment to be entered. In *Powers v. State*, it is said that the court advised itself in the premises. We cannot conceive how it did so, except by parol proof. The United States Supreme Court, in *Murphy, Administrator, v. Stewart, Administrator*, 2 How. 263, 11 L. Ed. 261, like the *New Hampshire* case, *supra*, deals fully with the matter, and holds parol proof competent, citing many authorities. Mr Freeman, in concluding his review of the matter (volume 1 on Judgments), speaks thus: "The law in relation to amendments, as stated by Lord Coke, and as it undoubtedly existed until long after his time, was too harsh to successfully resist the march of legal

reform, even in conservative England. As modified in that country, it is still too inconsistent with a liberal administration of the law to escape total overthrow in this country. The proposition that 'the power to amend a record' is confined to cases where the record discloses that the entry 'does not correctly give what was the judgment of the court' implies that ministerial authority is more sacred than judicial authority. This proposition is sustained by the averment that a record is of 'uncontrollable verity.' This verity is sufficiently respected when it is allowed to protect records from collateral assault. It is unduly indulged if it operate to the exclusion of truth, in every form and on every occasion. The object in every litigation is to obtain from some court a final determination of the rights of the parties. That determination is invariably what the judges direct, and not invariably what the clerks record. The power of the court to make the record express the judgment of the court with the utmost accuracy ought not to be restricted."

Black on Judgments, vol. 1, § 165, speaks to this point as follows: "The rule that 'a record can only be amended by matter of record' seems to rest, in the last analysis, upon the rule that 'a record imports absolute verity.' Without losing sight of the extreme importance of securing stability and authority to the solemn memorials of the courts, we may still conceive that this rule, if applied with full vigor and severity, might in many cases produce the greatest hardship and injustice. But it is evident to a student of American case law that we are gradually working away from the old standards in this respect. The courts are more and more disposed to a liberal practice, and to look to the full and perfect administration of justice, rather than to buttress up the sanctity of records by forbidding inquiry into their truth. Hence it is not improbable that the policy of permitting judgments to be amended upon cause shown by any

proper and satisfactory evidence will ultimately prevail. Certainly it is a policy that is commended by reason and justice, and still more by the loose way in which the records of our courts are but too frequently made up. To shut out any light which could help to make the records accurate, complete, and right in themselves appears to show a too superstitious reverence for the *litera scripta*."

Authorities could be multiplied indefinitely in support of this view. We are convinced, from a full and careful consideration of all the authorities, that the true view is the one stated by the supreme court of New Hampshire in *Frink v. Frink*, *supra*, and that, so far as competency of the evidence is concerned, any evidence of parol or other kind is competent, which throws material light on the truth of the matter, but that, of course, where there is nothing but mere memory, or parol evidence, such evidence should be very carefully and closely scrutinized. It would be a gross perversion of justice to exclude as incompetent parol evidence which might be overwhelming, as showing the error, merely because it is parol evidence. It is enough to say that, when the evidence is wholly by parol, it should receive the strictest scrutiny.

Applying these principles to the facts in this case, the judgment was properly corrected. *Affirmed.*

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is affirmed.

99 Miss.]

Brief for appellant.

ED. MYERS v. STATE.

[54 South. 849.]

CRIMINAL LAW. Judge. *Improper remarks.*

In the trial of a homicide case a witness for the state was asked on cross-examination: "Do you know whether or not accused was a person who was authorized and commanded by the conductor to help keep peace." On sustaining the objection of the state's attorney to this question the trial judge said: "I will sustain that because, if he had been a sheriff or governor he could not have shot this man down under circumstances like that;" this was reversible error, because it indicated to the jury that in the opinion of the judge accused was guilty as charged.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Ed Myers was convicted of manslaughter and appeals. The facts are stated in the opinion of the court.

W. U. Corley, for appellant.

The judge, by express statutory enactment, is forbidden to "sum up or comment on the testimony, or charge the jury as to the weight of the testimony." It is certainly contrary to our law and flagrantly violative of the fundamental principles of justice, for a judge to inject his opinion of the guilt of the defendant, says this court, in *Fuller v. State*, 85 Miss. 199. The judge presiding at a jury trial, in his remarks and conduct of the case, should endeavor to maintain a strict impartiality. It is error for him to express directly or indirectly an opinion which points to the guilt of the accused, or to make a statement which tends to discredit the accused with the jury. 12 Cyc. 538. Again this is laid down as being the great test, statements made by the trial judge in the presence and hearing of the jury, if given as instructions

for the state, would be wrong, makes a reversible error. 12 Cyc. 538. Now as to the remarks made by the court: "I will sustain that because even if he had been sheriff or governor he couldn't have shot this man down under circumstances like that." Suppose the court in its goodness had granted an instruction for the state, that a sheriff or a governor would have no right to shoot the man down like that, would this court for a moment entertain the idea of affirming this case? It was error for the trial judge to express himself either directly or indirectly in the trial of this case, and certainly this expression was an expression of his opinion, on ruling on admissibility of evidence, and certainly he was in this case, an intimation that defendant is guilty constitutes a reversible error, as invading the province of the jury. 12 Cyc. 540, and authorities cited thereunder.

M. E. McIntyre, for appellant.

No. 2 of assignment of errors. Because the court committed a serious error in using the following words in the presence and hearing of the jury, over the objections and exceptions of the defendant: "I will sustain that because if he had been a sheriff or governor, he couldn't have shot that man under circumstances like that." As to the second assignment as above set out, we feel that there is no necessity to indulge in an extensive argument of the respective province of the court and jury in the trial of a suit at law. Our court has repeatedly held that any improper remarks of the presiding judge as to the sufficiency of testimony to convict where there are disputed facts is a flagrant error and has always reversed the finding of the lower court where the presiding judge has, unthoughtedly, attempted to usurp the power of the jury. 85 Miss. 199; 12 Cyc. 540; *Wessel v. Breman*, 87 Mich. 481 and *Lerrott v. Shearer*, 17 Mich. 48.

Jas. R. McDowell, assistant attorney-general, for appellee.

The court used this language: "I will sustain that (the objection) because even if he had been sheriff or governor he could not have shot this man down under circumstances like that." In other words, it was attempted to be shown at that juncture of the trial that the defendant was acting as a peace officer. Objection was made to this testimony, and the court sustained the objection, using the objectionable remarks above quoted. I admit that these remarks are objectionable, but am not willing to admit that they should cause a reversal, for I am of that opinion that the jury could not have misinterpreted their meaning. In other words, the judge while he should have sustained the objection without comment, evidently meant that it made no difference under the circumstances then being detailed whether defendant was a private citizen or an officer of the law, that he had no right as one which he did not have as another. It is hard to conceive, that the jury could have concluded that the judge was attempting to tell them that the defendant was guilty and killed the deceased unlawfully. He evidently meant that the defendant as governor or sheriff would have had no more right to shoot this negro than any private citizen would have had.

SMITH, J., delivered the opinion of the court.

Appellant was indicted for and convicted of the crime of manslaughter. The evidence as to his guilt was conflicting. The homicide occurred on one of the trains of the Gulf & Ship Island Railroad Company, while, according to the evidence of appellant, he and another were attempting to prevent the deceased from disturbing the peace of the other passengers on the train.

While the state was introducing its evidence in chief, one of the witnesses on cross-examination was asked by counsel for appellant the following question: "Do you

Statement of the case.

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know whether or, not he (meaning appellant) was a person who was authorized and commanded by the conductor to help keep the peace?" In sustaining an objection to this question, the trial judge, unintentionally, we presume, indicated to the jury that in his opinion appellant was guilty as charged, by using the following language: "I will sustain that because, if he had been a sheriff or governor, he could not have shot this man down under circumstances like that."

For this error, the judgment of the court below must be, and is, reversed, and the cause remanded.

Reversed and remanded.

N. B. LANGFORD v. B. F. LEGGITT.

[54 South. 856.]

1. WAGES OF OVERSEERS. *Lien on agricultural products. Code 1906, section 3042.*

Where an overseer is hired by the year and wrongfully discharged before the termination of his contract under Code 1906, section 342, giving a lien on crops to overseer, etc., he has a lien for his wages already earned and those he would have earned until the expiration of his contract less any earnings after his discharge.

2. SAME.

And this is true even though at the time of the overseer's discharge he owed his employer more than the wages due at that time.

APPEAL from the circuit court of Madison county.

HON. W. A. HENRY, Judge.

Suit by B. F. Leggitt against N. B. Langford. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Reid & Foote, for appellant.

Does the lien of the statute attach for the wages not actually earned; for the wages not actually due for actual labor?

This lien did not exist at common law, and as it is derogatory of the common law, an employee to obtain its protection must come within its express terms.

We contend that the wages must be due for work actually done to entitle a laborer to its protection.

The reason of the enactment is in the fact that the laborer by his work or skill makes the security himself; actually creates the cotton or corn as the case may be, and as it is the product of his labor, his creation, he should be first paid before all others, except the lessee of the land. Paid for what? His part in its creation, for the part he actually took in making it.

So much of the product as represents his work, for that part, and that part only can he claim this lien.

The statute says in effect, "You have put so many dollars represented by so many days at so much a day in this cotton, you may take that out first."

Section 3042 makes this lien of the laborer "paramount to all liens and incumbrances or rights of any kind created by or against the person so contracting for such assistance except the lien of the lessor of the land on which the crop is made, for rent and supplies furnished."

An employer may give a chattel mortgage to a merchant on his crops and on the strength of same obtain all the supplies and advances necessary to make a crop, but even this mortgage would be inferior to the lien given the employee, under this section, who aids by his work in making the crop. Why? Because, and properly so, the laborer has actually created the merchant's security, and should be paid first.

But in the case at bar, appellee has been paid for the part he took in creating the security, and for this breach

of contract should stand with the other unsecured creditors.

An employer may employ one for twelve (12) months and discharge him after a day, wrongfully, and employ another who does all the work; makes the crop; will the employee who actually works all the year have to share the security with the one who puts in only a day? Such a construction as this would defeat entirely the purpose of the statute, viz.: Protecting the man who does the work, and bears the brunt.

Obviously the lien only attaches for wages representing actual work.

W. H. & R. H. Powell, for appellee.

Code 1880, section 1360, provided that, "And every employee, laborer, cropper, part owner, or other person who may aid by his labor to make, gather or prepare for sale or market any crop, shall have a lien on the interest of the person who contracts with him for such labor for his wages, share or interest in such crop, whatever may be the kind of wages or the nature of such interest, etc." No writing or record is required to validate the contract.

It was held in *Weise v. Rutland*, 71 Miss. 933, that an overseer or manager, under this broad language, was embraced by the statute and the court in concluding the opinion on page 936 says: "And it is difficult to conceive of a class which would more naturally or justly fall within the scope of the added language than that to which the appellee belongs."

Code 1892, section 2682, is the same as section 1360, Code 1880.

Laws 1894, page 61, amended section 2682, Code 1892, by adding the words "overseer or manager" and thus by legislative act embraced them also as parties who were entitled to the lien, this court by construction hav-

ing held that they were embraced under the Codes 1880 and 1892, *supra*.

Code 1906, section 3042, is the same as laws 1894, *supra*, and embraces "overseer or manager." *Buck v. Payne*, 52 Miss. 271.

In *Powell v. Smith*, 74 Miss., page 151, this court says: "The policy of the statute is to make sure to the laborer his wages." And in *Irwin v. Miller*, 72 Miss., at page 177, that "The primary and principal purpose of this section (2682) is to afford security to agricultural laborers;" in which case the benefit of the lien was extended to a ginner. In view of the fact that our people are mainly agriculturists, and of this unbroken course of legislation and decision it is impossible to hold that the lien of the employee or other person does not have equal scope with that of the landlord. The inconveniences, real or supposed, to flow from this—the argument *ab inconvenienti*—whatever aiding course they may furnish the construction of statutes of doubtful meaning can have none at all where the statute is clear and positive. If there be considerations which outweigh the present declared "policy of the statute," in favor of a change to a different one, these are to be addressed to the legislature."

The contention that the wages must be due for work actually done is utterly without merit. The statute does not so require.

Argued orally by *E. Mayes*, for appellees.

MAYES, C. J., delivered the opinion of the court.

On the 5th day of October, 1910, B. F. Leggett began a suit by attachment, in a justice court of Madison county, against N. B. Langford. In the affidavit praying for the attachment it is stated that Leggett was employed by Langford, during the year of 1910, as overseer on a certain plantation in Madison county, and as such Leggett assisted in making a crop of cotton and

corn; that these agricultural products were in the possession of Langford; and that affiant, by virtue of the contract and service thereunder, is entitled to a lien on the agricultural products named above to the amount of one hundred and eighty-five dollars, being the amount which Langford is due affiant for services as overseer, and which he fails to pay. After the filing of the affidavit, a writ of attachment was issued and levied on three bales of cotton, raised on the plantation in question and claimed by Langford, valued at something over sixty-six dollars each; the cotton then being in the possession of Langford, as alleged in the affidavit. Leggett recovered a judgment for the amount sued for, and Langford prosecuted an appeal to the circuit court.

The facts are virtually agreed to and are about as follows: It is agreed that in January, 1910, Langford employed Leggett as manager and overseer of a plantation in Madison county, upon which cotton and corn was raised during the year. Leggett seems to have been employed by the year, and was to be paid forty dollars a month. Leggett commenced work in January, and continued at work under the contract until some time in April, when Langford wrongfully discharged him. At the time Leggett was discharged, he owed Langford more than the amount which he had then actually earned under the contract. In short, at the actual date of the wrongful dismissal of Leggett, he then owed Langford more than the amount of his wages; but, deducting all that Leggett owed Langford from the total amount that would be owing Leggett at the end of the year, Langford was indebted to him at the date of this suit in a balance of one hundred and eighty-five dollars.

The real question in the case is whether or not, under section 3042, Code of 1906, an overseer has a lien on the agricultural products grown upon the place on which he was employed to work, where there is a breach of the contract of employment by the employer by wrongfully

discharging the overseer before the expiration of his contract of employment. It does not appear to us that the question is one of serious difficulty. It might be stated that the real question is whether or not the maxim of law "that no man shall profit by his own wrong" shall be suspended when it is sought to apply it to the case of an employer, who by his own wrongful act has injured his employee. Even if the statute did not cover this case, we can see no reason for not applying the maxim to this case, as well as in any other case. Section 3042 of the Code of 1906 provides that: "Every employee, laborer, cropper, part owner, overseer or manager, or other person who may aid by his labor to make, gather, or prepare for sale or market any crop, shall have a lien on the interest of the person who contracts with him for such labor for his wages, share or interest in such crop, whatever may be the kind of wages or the nature of the interest, which lien such employee, laborer, cropper, part owner, overseer or manager, or other person may offset, recoup or otherwise assert and maintain. And such lien shall be paramount to all liens and incumbrances or rights of any kind created by or against the person so contracting for such assistance, except the lien of the lessor of the land in which the crop is made, for rent and supplies furnished, as provided in the chapter on 'Landlord and Tenant.' "

It is argued by counsel for appellant that, in order for the statute to apply, it must be for "wages due for work actually done;" and say counsel: "The reason of the enactment is in the fact that the laborer by his work or skill makes the security himself, actually creates the cotton or corn, as the case may be; and as it is the product of his labor, his creation, he shall be first paid before all others, except the lessor of the land." It is quite true that the theory of the statute proceeds upon the idea that the laborer will work and create, but it also proceeds upon the idea that after he has contracted

so to do the employer will not wrongfully prevent and prohibit him from doing what he has contracted to do, and what the statute contemplates he will be allowed under the contract to do. If the laborer will not work and create, and gives the employer just cause for his dismissal, he loses his lien from the date of his failure; but if he wants to work and will work, and create for the employer, but the employer refuses to let him, and wrongfully discharges him, the employer is the loser, and not the employee. In such case the employer loses what the laborer would create if he were not wrongfully prevented from so doing; but the employee does not lose any benefit given him by the statute, and still has his lien for his wages for the entire contractual period, reduced by his earnings, if any, after discharge. In every instance where this court had given a construction to this statute, it has been a liberal construction in favor of the lien, securing to the laborer his wages under a contract of employment of this kind, where the statute creates the lien. Thus, in the case of *Buck v. Payne*, 52 Miss. 277, the court held that the policy of the statute was to make sure to the laborer his wages.

In the case of *Lumbley v. Thomas*, 65 Miss. 97, 5 South. 823, the court held that the statute applied, so as to give a lien on the agricultural products to a laborer, where it was shown that the work of the laborer was not confined to working in the crop, but also consisted in chopping wood and working in a blacksmith shop. The *Lumbley case*, *supra*, destroys the contention of appellant that the lien given by the statute attaches to only such products as the laborer helps by his labor to create. In working in the blacksmith shop or chopping wood, the laborer was certainly not helping to create any cotton or corn, or other agricultural products. The *Lumbley* case shows how liberal this court has always been in the construction of this statute, so as to make it carry out its purpose and secure the laborer in his wages. Again in

the case of *Irwin v. Miller*, 72 Miss. 174, 16 South. 678, the court says the primary and principal purpose of the statute is to afford security to the agricultural laborers. In view of the decisions above quoted, and the manifest purpose of the statute under review, we hold, without the slightest hesitation, that the statute applies to the case made by the facts now before the court. At the date of the institution of this suit, it appears that Langford owed Leggett his wages under the contract, amounting to the sum of one hundred and eighty-five dollars for which he had a lien. The rights of the parties are to be determined by the conditions which prevailed at the time of the institution of the suit.

Affirmed.

SMITH, J. (dissenting).

I think the lien conferred by the statute is for labor done, and not for labor which the laborer would have done, had he been permitted to do so. The case of *Lumblay v. Thomas*, 65 Miss. 97, 5 South. 823, is not in point. Thomas was employed to work on a plantation as a "wages hand and general laborer." The labor done by him consisted of "plowing, hoeing, chopping wood, hauling cotton, working in blacksmith shop, running the engine, and ginning the cotton." It will be observed that all of the work done by Thomas was necessary to be done in order that a crop might be made, and all of it, except possibly the chopping of wood and work in blacksmith shop, related directly to the making and preparing for market of the crop upon which the lien was claimed. And, moreover, it would have been practically impossible in that case for the court to have separated the amount due Thomas for chopping wood and for work in the blacksmith shop from the amount due him for plowing, hoeing, hauling cotton, running the engine, and ginning the cotton, for which he was undoubtedly entitled to a lien.

JOHN WILLIAMS v. STATE.

[54 South. 857.]

1. CRIMINAL LAW. *New Trial. Cumulative evidence. Corroborative Evidence.*

It is the general rule that courts will grant with great reluctance, new trials founded on newly discovered evidence, especially when such evidence is merely cumulative, but where the newly discovered evidence is corroborative, the rule is not enforced with the same strictness as where it is merely cumulative.

2. CUMULATIVE EVIDENCE. *Corroborative evidence.*

Cumulative evidence is evidence of the same kind as that already given to the same point. Evidence establishing the disputed fact by other circumstances than those shown on the trial is corroborative evidence and when newly discovery authorizes a new trial.

3. SAME.

All cumulative evidence is necessarily corroborative, but all corroborative evidence may not be cumulative.

4. RAPE. *Newly discovered evidence.*

Where on a trial for rape of a child under twelve years of age the age of the child was left in doubt by the evidence and it appears from newly discovered evidence that such doubt would probably be removed, a new trial should be granted on this ground.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

John Williams was convicted of the crime of rape and appeals.

The facts are fully stated in the opinion of the court.

A. M. Edwards and Hilton & Hilton, for appellant.

Jas. R. McDowell, assistant attorney-general, for the state.

Counsel on both sides filed elaborate briefs dealing only with the facts in the case.

ANDERSON, J., delivered the opinion of the court.

The appellant, John Williams, was convicted of the rape of a female child under the age of twelve years, sentenced to life imprisonment, and appeals to this court.

That the appellant used no force to accomplish his purpose, the female giving her consent thereto, is amply shown by the evidence. This fact, under the statute, constitutes no defense to the alleged crime, provided the female was, at the time, under the age of twelve years; while, if she was over twelve years of age, it would be a good defense. There is very serious doubt, from the evidence, whether, at the time of the alleged crime, the female was under the age of twelve years. One ground of the motion for a new trial is based on newly discovered evidence, namely, the evidence of three witnesses, who, it is alleged, would testify to facts and circumstances which would show that, at the time of the alleged crime, the female was over the age of twelve years. This ground of the motion is supported by the affidavit of the appellant in due form, as well as the affidavits of the witnesses whose testimony was discovered after the trial, in which they set out the facts to which they will testify, which, if true, show that at the time of the alleged crime she was in fact over twelve years of age.

It is undoubtedly the rule that courts will grant, with great reluctance, new trials founded on newly discovered evidence, especially when such evidence is merely cumulative, or which simply tends to impeach the testimony of one or more witnesses who have testified; but, where the newly discovered evidence is corroborative, the rule is not enforced with the same strictness as where it is merely cumulative. In *L., N. O. & T. Ry. Co. v. Crayton*, 69 Miss. 152, 12 South. 271, the distinction between corroborative and cumulative evidence is stated thus: "What does the legal mind understand by the words 'cumulative evidence?' Simply this: That cumulative evidence is evidence of the same kind as that already

given to the same point. Evidence of any disputed fact having been offered by showing particular circumstances, any evidence which only shows the same circumstances is purely cumulative. Evidence which would tend to establish the disputed fact by other circumstances is not cumulative, but corroborative. . . . All cumulative evidence is necessarily corroborative, but all corroborative evidence may not be cumulative."

The newly discovered evidence here cannot be said to be cumulative in the sense of this definition. Its purpose is to prove the same fact testified to by witnesses on the trial, but to prove it by different facts and circumstances than those so testified to. However, even though the newly discovered evidence is merely cumulative, there is a well-established exception to the rule that a new trial should not be granted on such evidence. In *L., N. O. & T. Ry. Co. v. Crayton*, *supra*, the court said: "There can be no doubt that the court, in the sound exercise of a legal discretion, may grant a new trial on the discovery of new evidence which is strictly cumulative; but the instances in which such exercise of legal discretion would be proper will be found rare indeed. Where the evidence upon which a case was originally tried was unsatisfactory, and the real issue was left in doubt, and newly discovered evidence is offered which will clearly put an end to the doubt, and finally and conclusively dispose of the litigation certainly, and otherwise than on the former trial, the duty of the court would be to award the new trial."

The age of the female was left in so much doubt by the evidence, and it appearing from the newly discovered evidence that such doubt would probably be removed, the court below should have granted a new trial on this ground.

Reversed and remanded.

LUCIUS RATCLIFF v. STATE.

[54 South. 947.]

CRIMINAL LAW. Arson. Sufficiency of evidence.

Where on a trial for arson the burning of the house was abundantly shown, but the only evidence that the burning was caused by a criminal agency was an alleged confession by accused and several slight circumstances tending to establish such criminal agency, but wholly insufficient for that purpose, a conviction will be reversed.

APPEAL from the circuit court of Lawrence county.

HON. A. E. WEATHERSBY, Judge.

Lucius Ratcliff was tried and convicted of arson and appeals.

The facts of the case are substantially as follows: In April, 1909, the dwelling house of Elijah Boone was burned in the night time; the fire originated in the smoke house located about six feet from the dwelling house. Lucius Ratcliff was charged with the burning of this house. The witness testified that a track was found leading away from the burned house on the morning after the burning which corresponded exactly with the track made by Lucius Ratcliff. There was also evidence that on the night of the fire a great many people had been around the house. There was an alleged confession by Ratcliff that he had burned the house, but this was denied; but when Ratcliff was arrested, he escaped from the officers and was at large some time before arrested. All the material facts were disputed by witnesses for the defense.

J. C. Oakes, for appellant.

In reference to the eleventh assignment of error, as discussed by the attorney-general, I concede that there

is some authority for his position, but the great weight of authority is that to make a confession admissible, it must be shown, affirmatively, that it was voluntary. The trend of the opinions rendered in this state uphold the doctrine that all confessions are presumptively involuntary and inadmissible, as announced in the case of *Jackson v. State*, 83 Ala. 76, 3 So. Rep. 847. The testimony of Zachary nowhere shows that the alleged confession was voluntary, and it would do violence to our understanding of human nature and human affairs to suppose that the appellant just up and made such a confession to Zachary, with no more preliminaries than was detailed by that witness. If such conversation did really take place (which I cannot believe), it would be unreasonable to suppose that Zachary detailed on the witness stand the whole of it. If the appellant did in fact make such a confession to Zachary, there was something that induced him to do so.

In reference to the 13th assignment of error, argued by the attorney-general, I beg to take issue with counsel on his theory that the smoke house was in such close proximity to the dwelling that it could not have burned without the dwelling also. The smoke house was at least six feet away from the dwelling, and the latter might have been saved from burning, had the fire been discovered in time.

Section 1038 of the Code of 1906: "Every person who shall willfully set fire to or burn, in the night time, and shop, warehouse, outhouse, or other building, not mentioned in the preceding sections, but adjoining to, or within the curtilage of, any house in which some human being shall usually stay, lodge, or reside at night, so that such human being, or the house in which such human being shall so usually stay, lodge, or reside at night, shall be thereby endangered, such person, so offending, shall be guilty of arson, and upon conviction thereof,

shall be imprisoned in the penitentiary not less than ten years."

If anybody willfully burned this house, the person who did it might, by proper indictment and proof, be convicted under section 1038, but never for the capital offense denounced by section 1036. Section 1038 was designated to cover just such a case as this one.

The statute, section 1036 of the Code, under which this indictment was drawn and conviction had, was intended to punish those miscreants who maliciously set fire to and burn, in the night time, dwellings, where he has reason to believe human beings are peacefully sleeping, with the intent thereby to destroy human life, or with a reckless disregard of human life. Nothing less than the taking of human life, or the attempt to take it, or wholly depraved disregard of it, could justify so severe a penalty as provided in the statute. The crime would not be so heinous if the fire was set to a house adjoining the dwelling, so that the occupants of the dwelling would necessarily be alarmed by the burning in time to escape, and the penalty for such a crime is fixed at not less than ten years by section 1038 of the Code of 1906. Can it be said that this smoke house was any closer to the dwelling than to adjoin it? If so, how far does a smoke house have to be away from another building before it "adjoins" it?

If that fire was of incendiary origin (which I have never believed), whoever set it, did so with the intention that the occupants should be aroused by the burning smoke house and escape with their lives, at least; otherwise, he would have set the dwelling on fire in the first place. It would have been as easy to set the dwelling as it was to set the smoke house.

Carl Fox, assistant attorney-general, for appellee.

The eleventh assignment of error has reference to the testimony of the witness, Steve Zachary, that defendant

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[99 Miss.]

had confessed to him that he had burned the house. Counsel's point is that the necessary foundation was not laid; that is, it was not proven that the confession was free and voluntary. I think counsel is mistaken. Even if this point be well taken, which I do not concede (1 Wigmore on Evidence, § 860), the record shows that the defendant, with his brother, was sitting down eating a watermelon at West Columbia Junction when witness came by and asked defendant for a match. The witness was asked to detail the conversation and did detail the conversation. He was not asked either on direct or cross-examination whether or not there was any coercion or inducement to elicit the confession but his testimony purports to be all that occurred, and the implication is unavoidable from his testimony that there was no coercion or inducement or influence of any kind brought to bear upon the defendant.

SMITH, J., delivered the opinion of the court.

The burning of the house was abundantly proven; but the only evidence, other than the alleged confession of the accused, which tended to establish that the burning was caused by a criminal agency, was several slight circumstances, wholly insufficient for this purpose. *Bolden v. State*, 54 South. 241. *Reversed and remanded.*

MAYES, C. J., dissents.

C. C. CROW v. W. N. CARTLEDGE, TAX COLLECTOR.

[54 South. 947.]

1. REPEAL OF STATUTES. *Effect on pending actions. Saving clause.*

Where a statute imposing a privilege tax is repealed by another statute, without any saving clause, the effect is to obliterate the repealed statute as completely as if it had never been passed. It is considered as a law which never existed, except for suits which were commenced and concluded while the repealed law was in force. By the repeal, the right to collect the unpaid tax is taken away, whether suit is pending or not, and the suit must end.

2. IMPAIRING OBLIGATION OF CONTRACTS.

Taxes are not due by virtue of any contract and the repeal of a statute imposing a privilege tax is not violative of the constitutional inhibition against impairing the obligation of contracts.

APPEAL from the circuit court of Webster county.

HON. G. A. McLEAN, Judge.

Suit by W. N. Cartledge, sheriff and tax collector, against C. C. Crow. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Flowers, Alexander & Whitfield, for appellant.

Our construction of section 3855 of 1906, is supported by the construction which the legislature has itself given this same act in the laws of 1910.

See Laws 1910, page 65, where section 3855 is brought forward and amended by adding the following:

“But this shall apply only to hotels belonging to a railroad, or railroads, or to hotels from which railroads receive a rental or a part of the profits arising from the keeping of such hotel.”

Certainly the legislature meant the same in 1906. The amendment made to the section was for the purpose of

making the meaning clear. This meaning is exactly that for which we have been contending as shown by our original brief herein. The legislature had perceived that the original act was to some extent obscure and this amendment was made not as an addition to the act but by way of explanation.

But at any rate and in any event the amendment contained in the Laws of 1910, above referred to, ends this controversy. The section 3855 as amended and re-enacted in the Laws of 1910 repeals and takes the place of section 3855 in the Code of 1906. This leaves no law on the books under which this tax can be collected. The law under which the proceeding was instituted has been repealed. The suit is still a pending one. This is settled by *Bradstreet Company v. Jackson*, 81 Miss. 233.

We understand that the said decision in 81 Mississippi and the authorities cited therein are conclusive of the questions presented by this appeal, even if there were nothing else to depend upon.

S. S. Hudson, attorney-general, for appellee.

ANDERSON, J., delivered the opinion of the court.

This is a suit by the appellee, W. N. Cartledge, as sheriff and tax collector of Webster county, against C. C. Crow, the appellant, for taxes alleged to be due the state by the appellant for the privilege of conducting a "rail-road eating house." There was a judgment in the court below in favor of the appellee, from which the appellant prosecutes this appeal.

The agreed facts are: That for six months, from November 1, 1908, to May 1, 1909, the appellant owned and conducted a hotel in the town of Mathiston, in Webster county, at the junction of the Southern Railway and the Mobile, Jackson & Kansas City Railway, two trunk lines of railroad, at which, from November 1, 1908, to May 1, 1909, one passenger train stopped daily to allow its passengers to take their meals, and from March 1, 1909, to

May 1, 1909, two passenger trains stopped daily for that purpose. That neither railroad had any interest in the hotel or received any rental therefrom, or any portion of the profits arising from the business. That appellant had not paid the privilege tax required by section 3855, Code 1906. This section provides a privilege tax of one hundred and twenty-five dollars per annum "on each railroad eating house, where two or more passenger trains, running on what is known as through trunk lines, stop daily for meals," and fifty dollars per annum "where only one such train stops daily for meals," and that such houses "may be licensed for less than one year by paying the proportion of annual privilege with ten per cent added, but the license must be the multiple of five dollars of not less than above specified." This suit was instituted on the 22d of April, 1909, and the judgment appealed from was rendered in December, 1909, while section 3855, Code 1906, was in force. This section was brought forward into chapter 94, p. 63, Laws 1910, and amended by the following being added thereto: "But this shall apply only to hotels belonging to a railroad, or railroads, or to hotels from which the railroad receives a rental, or part of the profits arising from the keeping of such hotels." By this amendment, so much of section 3855 as required privilege taxes of persons conducting railroad eating houses not owned by any railroad, or in the business of which no railroad had any interest, was repealed. There is no provision in chapter 94, Laws 1910, nor is there any general statute, saving to the state its rights under section 3855.

It is contended for the appellant that in this state of case the repeal of section 3855 abrogated the right of the state to collect any privilege taxes due thereunder. The effect of a repealing statute of this character is to abrogate the repealed statute as completely as if it had never been passed. It is considered as a law which never existed, except for suits which were commenced and con-

cluded while the repealed law was in force. By the repeal, the right to collect the unpaid tax was taken away, whether suit was pending therefor or not. The cause of action was taken away, and the suit must end. *Bradstreet Co. v. City of Jackson*, 81 Miss. 233, 32 South. 999.

There is no question here of legislation violating the constitutional inhibition against impairing the obligation of contracts. Taxes are not due by virtue of any contract.

Reversed and cause remanded.

R. B. MARSHALL, ADMINISTRATOR OF ESTATE OF J. T.
GIBBS v. JOHN DEERE PLOW COMPANY.

[54 South. 948.]

1. ESTATE OF DECEDENTS. *Executors and administrators. Claims. Notice to creditors. Sufficiency. Code 1906, sections 2103 and 2107.*

Section 2107, Code 1906, providing, that all claims against the estate of decedents shall be filed within one year after publication of notice to creditors or the same shall be barred, was intended to expedite the settlement of estates by providing a short statute of limitations.

2. SAME.

Section 2103, Code 1906, provides the method of putting the period of limitation, provided for in section 2107 into operation, and it can be put into operation in no other. This notice among other things must advise "all persons having claims against the estate to have the same probated and registered by the clerk of the court, granting letters, within one year, and that a failure to probate and register for one year will bar the claim."

APPEAL from the chancery court of Clay county.
HON. J. Q. ROBBINS, Chancellor.

In the matter of the estate of J. T. Gibbs, deceased. From an order allowing a claim of the John Deere Plow Company against said estate, R. B. Marshall the administrator appeals.

The notice published by the administrator to creditors was as follows:

“Whereas letters of administration on the estate of J. T. Gibbs, deceased, were granted to the undersigned on the first day of April, A. D., 1907, by the chancery court of Clay county, State of Mississippi. Now all persons having claims against the estate of said decedent are hereby notified to probate the same within the time limited by law or the same will be forever barred.

A. F. Fox, for appellant.

There are several assignments of error, but the decision of this court will probably depend, first, upon the question as to whether the publication of notice to creditors to present their claims for probate was sufficient; if the court should decide that question in the affirmative, the case must be reversed; but, if the court should decide that the publication of notice was insufficient as constructive notice; then, 2d, the court will determine the question as to whether the fact that the appellee had actual notice from Deanes, chancery clerk, as to when, how, and where to probate his claim, and the further fact that he did actually present his and had it registered and allowed on the 19th of June, 1907, long before it was barred by the twelve months statute, did not conclude or estop appellee from setting up the insufficiency of the notice to creditors. On this I say:

1st. The notice to creditors was substantially in compliance with the requirements of section 2103, Code 1906.

2d. Whatever irregularity there may have been in the notice, in the first place, was waived by the actual presentation of the claim, within the twelve months allowed

by law, under the notice he did have, and second, was cured by the actual notice given claimant.

On the first proposition, let us remember that in a case where a claimant has no notice except the constructive one given by the publication, there may be some reason in holding that the statute should be construed strictly, in the event that he fails to present his claim for the want of actual notice, the rule has no sort of application, where the notice, whatever may be its defects, is effective in causing claimant to present his claim within the time required; and let us also remember that, in no case should there be a strained construction of the statute.

Noticing, *seriatim*, the objections of counsel to the publication: 1. Because it is signed "B. B." instead of "R. B." This is manifestly a mistake of the printer or a clerical error. It makes no difference, whether the administrator is named Smith or Jones. It is the administrator that must give the notice, and if it is signed by the administrator, it is sufficient. It is so signed in this case. It has been held that it is sufficient if signed by the clerk. Am. and Eng. Ency. Law, vol. 8, p. 1082.

The objection also made that the notice does not state that the claim shall be probated within one year; it does state that it shall be probated within the time limited by law. That this is sufficient, see Am. and Eng. Ency. of Law, vol. 8, p. 1082; Cyc. of Law and Procedure, vol. 18, p. 477.

Finally it is objected that the notice does not state that a failure to probate and register the claim within twelve months will bar the claim. The notice does state that the claim must be probated within the time limited by law or it will be forever barred, and this is sufficient under the above authorities, and is substantially a compliance with the statute. So we say that the notice is in all respects sufficient, even under a strict construction of the statute, which does not require a strained construction.

Slight errors and omissions that are not misleading and do not affect the substance of the notice are immaterial. Cyc., vol. 18, p. 477.

If this court should decide that under a fair and reasonable, and not under any strained construction of section 2103 of the Code, the notice to creditors given, under said section, was insufficient to bar a claimant who had never seen or heard of the publication of the notice, who had nothing but the constructive notice provided by the statute, and who therefore had no opportunity to probate and have registered his claim, we insist that the case under consideration is in every way different, and that the rule invoked by appellee has no sort of application in this case.

What is the instant case? In the first place it is not a case in which the claimant was barred of the opportunity of presenting and having probated his claim for the want of notice. On the contrary it is a case where the notice was ample and served its purpose. Claimant made no objection for any irregularity, but on the contrary, immediately acted under it. He knew exactly what to do, where to do it, and when to do it. He only wanted to know how to do it, and wrote to the chancery clerk for the desired information, knowing him to be the proper officer.

It is the height of absurdity to talk about the insufficiency of a notice that has proven to be sufficient, and has served its purpose.

Frank A. Critz, for appellee.

There is in fact, but one single question for the court to decide in this case and that is the sufficiency or insufficiency of the notice to creditors.

If this notice is a substantial compliance with section 2103 of the Code of 1906, the decision of the court should be for the appellant; and if the notice is not a substantial compliance with said section of the Code, then the decision, of course, will be for the appellee.

1. This pretended notice is not signed by the administrator at all. It is signed "B. B. Marshall" instead of R. B. Marshall. "B. B. Marshall" is as essentially different from "R. B. Marshall" as "Joe Smith" is from "R. B. Marshall." So the proposition resolves itself into this: Is it necessary for the administrator to sign this notice at all, and if he does sign it, is he required to sign it with his own name or with somebody else's name?

We don't know of any case in the books where a legal notice, and a notice which is required by law to be given, is valid, unless it be signed by somebody.

Section 2123 of the Code requires that said notice shall give the time when the administrator was appointed. This clearly means that it must give the date of the appointment and the name of the administrator. This notice states that "Whereas letters of administration on the estate of J. T. Gibbs, deceased, were granted to the undersigned."

The undersigned is B. B. Marshall, and no letters of administration were ever granted to B. B. Marshall.

2. Said pretended notice does not require or notify creditors to have their claims probated by the clerk of the court granting the letters of administration and does not give any notice, whatever, to creditors as to what officer said claims are to be probated before, nor where he is to be found.

It is useless to argue that everybody knows that the clerk is the person to probate such claims and that everybody knows where the clerk's office is. The law does not presume that everybody knows all of these things, but provides in said section 2103 of the Code that a notice shall be published, giving clear, unequivocal and unmistakable information as to all these matters. Is the court to be called upon to ignore the plain provisions of the statute and to say that they are unnecessary?

3. Said pretended notice does not require or notify creditors to have their claims registered by said clerk, nor does it give any notice, whatever, to creditors, that said registration is necessary, or required.

A failure to register the claim for twelve months would as certainly bar it as a failure to probate it, and if it be necessary to give notice, under section 2103, to probate the claims, it is equally necessary to give the notice to register the same, because the statute requires the notice to creditors to require them "to have the same probated and registered."

It seems to us useless to argue that the omission of the notice to have the claim registered falls as far short of the requirements of the statute as if notice had failed to require creditors to have said claims probated.

Section 2105 of the Code provides that the administrator, or executor, "shall not pay any claim against the deceased unless the same has been probated, allowed and registered." Section 2106 gives the substance of the probating affidavit, after which the clerk is to endorse on the claim, "Probated and allowed for \$— and registered, this — day of — A. D. —" and shall sign his name officially thereto."

"Probate, registration and allowance shall be sufficient presentation of the claim to the executor or administrator."

Section 2107 of the Code says: "The claim shall be registered, probated and allowed, in the court in which the letters testamentary, or administration, are granted," and a failure to so have the claim registered, probated and allowed will bar the same within one year after publication and notice to creditors.

Section 2109 of the Code requires that the claim of the executor, or administrator, shall be probated and registered, as other claims.

In the *Cheairs case*, 81 Miss. 662 *et seq.*, the court will observe that on page 674 special stress is placed upon

the essential words in the probating affidavit, as prescribed by section 1932 of the Code of 1892, which is the same as section 2106 of the Code of 1906, and these essential words, in each instance, are probated, allowed and registered. Each one is essential and it is clear that a failure to register the claim would be as fatal to it as a failure to probate it. The administrator dare not pay a claim which is not registered, as shown by the various sections of the Code to which we have already referred.

SMITH, J., delivered the opinion of the court.

In order that the estates of decedents may be speedily settled, creditors thereof who fail to comply with the terms of section 2107 of the Code are barred from collecting claims against such an estate in a much shorter time than is prescribed for the collection of debts generally. Section 2103 of the Code provides the method of putting the period of limitations prescribed by section 2107 into operation, and it can be put into operation in no other. The method provided is the giving of certain information to creditors by means of a published or posted notice, which notice, among other things, must advise "all persons having claims against the estate to have the same probated and registered by the clerk of the court granting letters, within one year," and also "that a failure to probate and register for one year will bar the claim." This information is not contained in the notice now under consideration, and consequently the period of limitation prescribed by section 2107 of the Code was not thereby put into operation.

One object of the notice is to call attention of creditors, so far as this can be done by publication, specifically to the fact that in order that their claims may not be barred, they must, within one year, have them probated and registered by the clerk of the court granting the letters of administration. Were we to hold that the omission of this information from the notice now under con-

sideration did not avoid it, for the reason, as argued by counsel for appellant, that all persons are charged with knowledge of the law, and consequently are charged with knowledge of the provisions of section 2107 would logically result in a notice being held sufficient which simply stated the person publishing it had been appointed administrator of an estate, and advised all persons having claims against the estate to deal therewith as the law directs. The statute is not so written, and we cannot so construe it. All that was decided in *Stokes v. Lemon & Gale Co.*, 52 South. 457, to which we have been referred by counsel for appellant, was that the use of the word "file," instead of the word "register," was a substantial compliance with the statute.

Other objections are raised to this notice; but, since the judgment of the court below must be affirmed by reason of the foregoing views, it becomes unnecessary for us to notice these other objections. That appellee may have had actual notice of the death of the decedent, and of the appointment of appellant as his administrator, is immaterial.

Affirmed.

MAYES, C. J. (dissenting). I cannot agree that the notice to creditors published by the administrator in this case does not fully meet the requirements of section 2103, Code 1906. The notice is as follows: "Whereas, letters of administration on the estate of J. T. Gibbs, deceased, were granted to the undersigned, on the 1st day of April, 1907, by the chancery court of Clay county, state of Mississippi. Now all persons having claims against the estate of said decedent are hereby notified to probate the same within the time limited by law, or the same will be forever barred." The statute provides that the executor or administrator "publish in some newspaper in the county a notice requiring all persons having claims against the estate to have the same probated and registered by the clerk of the court granting

letters, within one year, which notice shall state that a failure to probate and register for one year will bar the claim, and the time when the letters were granted; and the notice shall be published for three consecutive weeks, and proof of the publication shall be filed with the clerk."

Comparing the statute with the notice, every substantial thing required by the statute to be set out in the notice is found there. All information which it is necessary that the creditors should have, in order that the purpose of the statute may be accomplished, is given in the published notice. I do not think it should be held by this court that a literal following of the statute is necessary. What is left out of the notice? The statute only requires two specific things to be stated. It requires that the administrator shall state the time when the letters were granted. The notice shows that this was done. The notice states letters were granted on April 1, 1907. The statute then requires that the notice shall state that a failure to probate and register for one year will bar the claim. The notice does state that all persons having claims against the estate are notified to probate same within the time allowed by law, or the claim will be barred. In my judgment, this was all that was necessary. The notice further states that the administration was granted by the chancery court of Clay county. It seems to me that every substantial thing which the statute required was set out in the notice, and the information intended by the statute to be conveyed to the creditors is as complete as if there had been a reproduction of the statute itself in the notice. *Henderson v. Illsey*, 11 Smedes & M. 9, 49 Am. Dec. 41; *Borum v. Bell*, 132 Ala. 85, 31 South. 454.

STATE EX REL. E. H. NALL, LAND COMMISSIONERS, v. J. W. WILLIAMS ET AL.

[54 South. 951.]

1. **ESCHEAT.** *Required proof. Presumptions. Survivorship of heirs.*

In an action of escheat the state must recover if at all upon the strength of its own title and not the weakness of that of the defendant.

2. **PRESUMPTIONS.**

The presumption of law that a person dying intestate has left heirs capable of inheriting his estate is one of the strongest presumptions known to law, because the presumption itself runs with the usual current of nature.

3. **SAME.**

This presumption can only be overcome by positive proof of the want of persons capable of taking the estate under the laws of descent and distribution.

APPEAL from the chancery court of Warren county.

HON. E. N. THOMAS, Chancellor.

This was a proceeding by the state of Mississippi on the relation of E. H. Nall, land commissioner, against J. W. Williams et al. to escheat land. From a decree dismissing the petition, the state appeals.

The facts are fully stated in the opinion of the court.

McKnight & McKnight, for appellant.

The proposition of law, which the appellant was required to meet, is this: "The law presumes that a decedent left heirs capable of inheriting, and it is incumbent upon the state to rebut this presumption by proof." Escheats, 16 Cyc. 555.

The burden upon appellant, on this proposition, being that of proving a negative, the rule of law is as follows: "The party whose contention requires proof of a nega-

tive fact has the burden of evidence to prove that fact. In deciding, however, what *quantum* of evidence shall be deemed sufficient, the practical limitations on the proof imposed by the nature of the subject-matter or the relative situation of the parties will be considered, and the burden of evidence will be sustained by proof which renders probable the existence of the negative fact; circumstantial evidence being sufficient and nothing in the nature of a demonstration being required. "16 Cyc. 936, and authorities there cited. And, "to establish a negative the same degree of proof is not ordinarily necessary as in cases where proof of an affirmative is required. Generally a negative fact is sufficiently proved *prima facie* by proving some affirmative fact or state of facts inconsistent with the affirmative of the proposition to be negated and therefore raising a presumption that the negative is true." 17 Cyc. 780, and authorities there cited.

Positive evidence of the failure of heirs is not necessary; 16 Cyc., p. 656, note 80, and authorities there cited.

We respectfully submit, that the evidence in this case, when weighed by any rule and especially by the rule as to the proof of a negative, which we submit is applicable here, shows and establishes, sufficiently and clearly, the failure of heirs of Miles P. Bristol, Jr.

Under Code of 1857, page 448, art. 96, it was proper for the court to allow farm to be cultivated until final settlement of estate.

J. W. Williams, appellee, took an order at the January term, 1868, approving the report of the commissioners to appraise rents of the lands as the property of Miles P. Bristol, Jr.

The Statute of Limitations which ran against the state from 1857 was repealed by Act of January 24, 1877, page 82, so as not to apply to the state, thus the bar did not attach. J. W. Williams was discharged as administrator on November 23, 1880.

99 Miss.]

Brief for appellee.

For the reasons above stated, we respectfully submit that the court below erred in its findings, from the evidence, upon which its decree was based; and therefore erred in dismissing the bill or petition for escheat and in not decreeing in favor of the appellant, and that the decree below should be reversed and a decree here for appellant.

Dabney & Dabney, Catchings & Catchings and McCabe & McCabe, for appellee.

The law as to escheats in force in 1864 or 1865 when Miles P. Bristol, Jr., died, is article 1 of section 1, on page 187, of the Code of 1857, and is as follows:

"If any person shall die intestate, who was seized of, or held, either in possession or in right, at the time of his death, real or personal property, or money or choses in action, in this state, whether such person was a citizen of the state or not, and leave no heir capable of inheriting, or taking the same, all such property, real and personal shall escheat to the state of Mississippi. But if such deceased person left a husband or wife surviving, and capable of holding the same, his property shall not escheat to the state, but the surviving husband or wife shall in such case be the lawful heir, and take the same as such."

It will be seen from this statute that by its own terms the state becomes vested with the title to all property or money or choses in action of which an intestate was seized or held either in possession or in right at the time of his death, where no heir was left capable of inheriting or taking the same. The title begins, it will be seen, at the time of the death of the intestate.

Whatever title, therefore, came to the appellant, came at the moment of the death of Miles P. Bristol, Jr., in 1865.

It appears, therefore, that forty-two years passed by

before the appellant propounded its claim to this property upon the theory that it had acquired title in 1865 to it.

The right of the sovereign to escheat property is not contractual. It is purely statutory. Hence when property is claimed as escheated the state must have satisfactory proof in support of every condition which must exist in order to confer title upon it.

While in this state, unfortunately, the Statute of Limitations no longer runs against the state, yet inasmuch as a very long delay on the part of the state in asserting rights claimed to belong to it may result in great wrong to confiding citizens who are wholly ignorant that the state possesses a claim which it could assert, courts will look critically upon all proof produced upon which it is sought to acquire for itself property which it claims as escheated.

The golden words of Judge Calhoun, in closing the opinion of this court in the case of *Warren County v. Lamkin*, 93 Miss. 166, should be given their fullest application in the case now before this court. Judge Calhoun said:

“By this doctrine of sovereignty, in its application to the rights of owners of land, many worthy and confiding families of poor people have been stripped of house and home and compelled to begin life anew. We reiterate that this must not be done, unless it is necessitated by the strictest construction of the law in favor of the occupant.”

Before considering the value of the testimony offered by the appellant in support of its contention that Miles P. Bristol, Jr., died without heirs, we invite the attention of the court to section 2186, vol. 3 of Elliott on Evidence: “Sec. 2186. Presumptions.—The presumption of law is that a person dying intestate has left heirs capable of succeeding to his estate. The presumption

that the estate of such person is transmitted to others by the law of descent, is so strong that it must be overcome by positive proof of the want of persons capable of taking the estate under the laws of descent and distribution. And where the proof shows that an intestate died without issue or lineal heirs, the presumption of collateral heirs prevails. But it is held that proof of the fact of there being no known heirs might raise a presumption of the failure of the inheritable blood; but such proof should be direct and positive, shown to be founded upon inquiry, advertisements, personal family knowledge of the declarations of those from whom the property descended. It has been doubted, if mere hearsay reputation of the failure of heirs will overcome the legal presumption. And the presumption was held to be so conclusive that it was not overcome by proof of the fact that neighbors and acquaintances of an intestate who had known him for many years, did not know that there was in fact persons capable of taking his estate under the law. The law presumes that every child is the offspring of a lawful union of its parents, and in the absence of any negative evidence no further proof of marriage is necessary."

What is here said contains all the law and the prophets upon the proposition discussed. It will be seen that the distinguished author declares that the presumption of law that a person dying intestate has left heirs capable of succeeding to his estate is so strong that it can only be overcome by positive proof that there are no persons capable of taking under the laws of descent and distribution.

It will also be observed that he states that where the proof shows that an intestate died without issue or lineal heirs the presumption of collateral heirs still prevails.

He also states that while proof of the fact that there are no known heirs, might raise a presumption of the

failure of inheritable blood, yet such proof must be direct and positive.

He also states that such proof must be shown to be founded upon inquiry, advertisements, personal family knowledge, or the declarations of those from whom the property descended.

It is also to be noted that he states, and in this the authority supports him, that it has been doubted if mere hearsay reputation of the failure of heirs will overcome the legal presumption. He also states that this legal presumption is so conclusive that it will not be overcome by proof of the fact that neighbors and acquaintances of the intestate, who have known him for many years, did not know that there were in fact persons capable of taking his estate under the law.

Argued orally by *Theodore McKnight*, for appellant, and *M. Dabney*, for appellee.

MAYES, C. J., delivered the opinion of the court.

In this case we feel safe in saying that the record shows, almost beyond dispute, that Miles P. Bristol, Jr., died some time prior to December, 1865; that at the time of his death he was the owner of the land in controversy by inheritance from his father; that when he died he was intestate. From 1865 to the present time J. W. Williams and those claiming through him have claimed to be the owners of this property, have held open, notorious, continuous, adverse possession, exercising all the acts of ownership, and making many and very valuable improvements on the land. In 1907, some forty-two years after the death of the owner of the land, the state undertakes by this proceeding to escheat this property. The proceeding is founded upon section 1878 of the Code of 1906, and the ground alleged as cause for the escheat is that Miles P. Bristol, Jr., died intestate and owning the property, leaving no heir capable of inheriting from

him. The tract of land consists of about three hundred and fifty acres lying in Warren county.

In this contest for the ownership of this property, it may be well to remark that the state must recover, if at all, on the strength of its own title, and not the weakness of that of appellees. It may further be remarked that it is most unusual, not to say unnatural, that there shall live a person who does not have some heir, living at the time of his death, capable of inheriting his property. For this reason, the presumption of law that a person dying intestate has left heirs capable of inheriting his estate is one of the strongest presumptions known to law, because the presumption itself runs with the usual current of nature. In considering this case let us keep these principles in mind, and let us also keep in view the fact that the state has no purpose to take away from any of its citizens any property to which such citizen may be justly entitled.

What are the main facts on which the state relies in order to have this property declared forfeited as escheated property? The owner died in 1864 or 1865. One of the appellees, J. W. Williams, was the administrator of the estate of the owner, and so continued until his final discharge in 1880. In making the application for the grant of letters of administration, Williams swore that Miles P. Bristol, Jr., had no relatives so far as he knew. The lands were assessed for taxes to the heirs of Miles P. Bristol until in the year 1883, at which time they were assessed to J. W. Williams. From 1864 or 1865, from the death of Miles P. Bristol, Jr., the owner, down to this time, no one has undertaken to oust appellees from the land in question as heirs of the owner. This puts the case about as it appears on the state's testimony. In truth, the idea of the state's counsel seems to be that because the owner died some forty-two years before the suit was begun, and because in all that time no one has appeared as an heir undertaking to oust ap-

pellees, this fact, coupled with the other circumstances set out above, makes out a case strong enough to overcome the legal presumption, that the owner died having heirs capable of inheriting. As we will undertake to show a little later, it cannot be said that no one had ever appeared claiming to be an heir, for some testimony in the record shows otherwise. The appellees show that J. W. Williams and those claiming through him have held the property as their own from 1864 or 1865 to date. For many years they have paid the taxes on the property and placed valuable improvements on same. Mr. Lease says that some time in 1880 there was a party, so he was told, laying claim to the property as heir of the owner, but abandoned the claim because he stated that there were so many heirs that the property would not be worth a controversy. H. F. Simrall, a lawyer, testifies that about 1880 some one called on him to talk to him about this property. He does not remember whether such person claimed to be an heir or not; but the person called to talk over the Bristol matter, and because they could not agree the person left.

Another important fact to be kept in mind is that for forty-two years the state has not moved in this matter, but has let the time pass when it would have been possible to find living persons who knew the family and its history, who knew where they came from, and who were their relatives. During this time the state has allowed appellees to occupy the land as their own, and to make improvements thereon, and to pay the taxes. These things in themselves may not be conclusive against the state; but in this character of proceeding they are to be considered, along with the other testimony, as showing that the reason why those in authority at the date of the death of the owner did not proceed to claim the estate for the state at the time was because it was known that there were heirs. It is also shown that the mother of the owner came from about Baton Rouge, Louisiana,

and yet no inquiry was instituted there to find out if there were relatives, no advertisement was made for the heirs, and no investigation or inquiry instituted beyond the immediate locality in which the death occurred.

Before the state can succeed, it was incumbent upon it to make all the inquiries, investigations, and advertisements. In section 2186 of Elliott on Evidence will be found the best statement of the rule on the subject of the legal presumption of heirs. It is that the "presumption of law is that a person dying intestate has left heirs capable of succeeding to his estate. This presumption that the estate of such person is transmitted to others by the law of descent is so strong, that it can only be overcome by positive proof of the want of persons capable of taking the estate under the laws of descent and distribution. . . . The presumption was held to be so conclusive that it was not overcome by proof of the fact that neighbors and acquaintances of an intestate who had known him for many years, did not know that there were in fact persons capable of taking his estate under the law." Again the same authority says that "it is held that proof of the fact of there being no known heirs might raise a presumption of the failure of the inheritable blood; but such proof should be direct and positive, shown to be founded upon inquiry, advertisement, personal family knowledge, or the declarations of those from whom the property descended."

When the proof offered by the state is measured by the requirements of the rule quoted above, it fails to measure up to it in almost every particular. In the case of *University of North Carolina v. Harrison*, 90 N. C. 385, it is said: "The party claiming must prevail by the strength of his own title, not by the weakness of that of his adversary. What degree of evidence is necessary, then, to make out any presumption of probability whatever, sufficient in the absence of opposing testimony to show the state's title by reason of defect of

heirs, or to furnish any ground for a verdict in favor of the people? The ordinary rational, as well as legal, presumption as to every person is that he must have some relations, and consequently some heirs, however remote, and whether known to him or not. From the natural laws of human descent and relationship, this must be so; and the necessary presumption must be that every citizen dying leaves some one entitled to claim as his heir, however remote, unless one or the other of the only two exceptions known to our law (alienage and illegitimacy) should intervene. . . . Proof of the fact of there being no known heirs of the deceased may well raise a presumption that for some unknown reason the inheritable blood had failed, provided such proof be direct and positive, founded upon inquiry, advertisements, personal family knowledge, or the actual declaration of the person last seized, or of those from whom his title descended. But can he, with propriety, go further than this, and permit the natural and general presumption of kindred to be combated at all by proof of mere hearsay reputation?"

If it be said that the degree of proof required by these authorities is so high that it can rarely be made, the answer is to be found in the statement that the reason for the rule grows out of the fact that a knowledge of human affairs teaches that a case rarely exists in fact where any person dies without near or remote heirs capable of inheriting. In the case of *Harvey v. Thornton*, 14 Ill. 217, it is stated that "it is difficult to imagine a case, unless it be that of a bastard, dying intestate and without issue, where an intestate does not leave kindred on whom the law casts his estate." We thus see that the standard of proof required to show that there are no heirs is fixed high, because such an event is unnatural, improbable, and almost impossible. We can conceive of no case where the proof on the part of the state necessary to overcome the legal presumption in favor of heir-

ship should be more positive and clear than in this case. The state does not move in this matter until, from the lapse of time, it may well be assumed that those who could have cleared up the situation have all passed into the Great Beyond. Various property rights have been acquired by innocent persons, and the land has been paying its obligated tax to the state. The state has acquiesced in a condition which acknowledged that there were heirs, else it would have proceeded with its escheat proceedings soon after the death of the owner. The state has not merely remained quiescent as to a vacant tract of land, but as to an occupied tract for forty-two years. It has seen the land cultivated and improved for all that time, and all these things may be weighed, under the facts of this case, in the scale of proof as tending to show that the reason for this was a knowledge, at the time, that the owner had heirs. This principle of law is recognized in the case of *Blomquest v. Gardner*, 95 Miss. 309, 48 South. 724, where the court says that, with the witnesses all dead who could clear up the facts of that case by the lapse of a long time, the facts should be established by the most undoubted proof before a deed should be overthrown by proffered proof that it was never signed.

No added weight or force can be given to the contentions in this case because the proceedings are instituted by the state. When the state is a litigant in its own tribunals, it expects and shall receive the same measure of right that it establishes for its humblest citizen. As was said in the case of *Warren County v. Lamkin*, 93 Miss. 166, 46 South. 513, 22 L. R. A. (N. S.) 920: "By this doctrine of sovereignty, in its application to the rights of owners of land, many worthy and confiding families of poor people have been stripped of house and home and compelled to begin life anew. We reiterate that this must not be done, unless it is necessitated by the strictest construction of the law in favor of the occupant."

Affirmed.

Statement of the case.

[99 Miss.]

A. M. DEUSIN v. HINDS BROS. & Co.

[54 South. 956.]

VENDOR AND VENDEE. *Acceptance of goods.*

When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely receiving them, for receipt is one thing and acceptance is another. But receipt will become acceptance, if the right of rejection is not exercised within a reasonable time, or if any act be done by the buyer which he would have no right to do unless he was the owner of the goods.

APPEAL from the circuit court of Lee county.

HON. JOHN MITCHELL, Judge.

This was a suit brought by A. & M. Drusin of New York City, New York, in the justice court of Lee county, Mississippi, against Hinds Brothers & Company, of Tupelo, Mississippi, on an account amounting to sixty-three dollars for goods sold and delivered by appellant to appellee. From a judgment in the justice court in favor of the appellant, the appellee appealed to the circuit court and from a judgment in the circuit court in favor of the appellee, appellant appeals to this court.

The facts are these: That sometime about the latter part of April, 1907, appellee purchased from the appellant through their traveling salesman, B. Frankfort, a bill of cloaks which amounted to sixty-three dollars, to be shipped to appellee on August 15, 1907, and that appellant made up and shipped to appellee the exact quality, quantity, size and style of goods as ordered by appellee and corresponding with the samples carried by said traveling salesman and said goods were delivered to appellee, Hinds Brothers & Company, on August 28, 1907, and that the goods remained in possession of appellee until the 1st day of November of the same year,

before any complaint was made by appellee concerning the goods whatever.

Boggan & Leake, for appellant.

Our contention in this case is, that appellee retained these goods in their possession long enough to become an acceptance of the goods, for the proof showed that they were delivered to appellee on the 28th of August and remained in their possession and control until the first day of November of the same year, and according to the terms of the order as shown by exhibit "A" to Abraham Drusin's first deposition, these goods were to have been shipped on the 15th of August, 1907, and paid for in thirty days. There is nothing to contradict this statement except the testimony of E. C. Hinds, a member of the firm of appellee, who says that these goods were purchased for October delivery, then according to the statement of Mr. Hinds, appellee had control and possession of the goods for thirty days, this of itself certainly makes an unreasonable length of time for the inspection of the goods and determine whether or not they would accept them, and the court for this reason should have given the appellant a peremptory instruction that the goods had been accepted.

It will also be noticed from exhibit "B" to Abraham Drusin's deposition, that the following clause was in the invoice sent by appellant to appellee, viz.: "No claims for deficiencies or imperfections allowed unless made within five days of receipt of goods." Mr. Hinds admits, as shown in his testimony, that it would have taken only a few minutes to have opened up and inspected these goods; see Am. and Eng. Ency. of Law, vol. 24, pp. 1089, 1090 and 1091, paragraphs b and c; also, *Stillwell v. Biloxi Canning Co.*, 78 Miss. 779, and in the opinion of the court on page 786, Judge Terral says: "The intention of the appellee as manifested by its acts must override and control the expressions in its letters to

Brief for appellant:

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appellant on the same subject. Benj., Sales, Am. Ed., by Bennett, sec. 703, says, "When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely receiving them, for receipt is one thing and acceptance is another. But receipt will become acceptance if the right of rejection is not exercised within a reasonable time, or if any act be done by the buyer which he would have no right to do unless he were the owner of the goods."

The appellee had the opportunity in this case of keeping the goods in their store and offering them for sale for over two months, then when the season was practically over for the sale of such goods they sought to reject them.

The appellees were allowed to introduce evidence by B. Frankfort, the traveling salesman of A. & M. Drusin, to show that said traveling salesman told a member of the firm of the appellee, that appellee could return the goods, this conversation occurred in the spring of 1908, after the goods had been returned in November, 1907. It is shown by the deposition of Abraham Drusin that B. Frankfort was only the traveling salesman of the appellant and was not their agent or adjuster and had no authority to make any such statements; see Am. and Eng. Ency. of Law, vol. 6, p. 224, 11 and 3, also, note 4.

The court should not have allowed evidence to be introduced to show that on or about the 26th day of October, 1908, which was about a year after these goods were returned and five or six months after suit was brought that appellee through their attorneys located these goods and offered them to appellant. It seems to us that the only issue in this case was whether these goods were as represented and what amount of damage, if any, appellee, was entitled to for their failure to be as represented. There were no pleadings in the case to show that appellee claimed any damage, hence the acceptance of the goods was absolute and they were not entitled to any damage; see Am. and Eng. of Law, vol. 24, page 1157, § 3.

Clayton, Mitchell & Clayton, for appellee.

This assignment of error is predicated upon the failure of the court below to give a peremptory instruction for the plaintiff, who is the appellee here. The question upon which the case hinged, was this: did the appellee retain the goods an unreasonable time before returning them, so as to be held to have accepted them?

This was peculiarly a question for the jury to determine, under the instructions of the court. We quote from the opinion of this court in the case of *Strauss v. Furniture Co.*, 76 Miss. 343

"All these issues of fact—whether the defendants had accepted or rejected the goods or had ratified the alleged sale of these goods by their subsequent dealing with them . . . were for the jury under proper directions as to the law." Page 352, last paragraph.

So in the case before the court, the question of acceptance and whether the retention was unreasonable, were questions for the jury.

The testimony of the conversation of E. C. Hinds with B. Frankfort was clearly admissible. Frankfort was no ordinary traveling salesman, but a merchandise broker as appears from the testimony of Mr. Hinds. In his testimony, Mr. Hinds uses the following language, to-wit:

"I don't think either one of you quite understand Mr. Frankfort's position in this matter. Carpele & Frankfort are resident buyers in New York of goods of that character and they travel out all over the country and sell goods for all these firms and they get a commission from these different firms for selling these goods and they are as much in their employ today as they ever were. He is not a salaried man at all.

"When he was here in the spring, is that when you had this conversation with him, and did he still at that time carry samples for Drusin? Yes, sir, had both of

his lines. (By the court): At the time he made this statement to you? Yes, sir."

Frankfort was a merchandise broker, who had an interest in the matter, to-wit: his commission, and was there at that time trying to adjust the matter, having previously had a conversation with Drusin in reference thereto and as he was there at that time to adjust the matter, his declarations are binding upon the said Drusin and were properly admitted. Admissions and declarations made by either an agent or broker, in the course of the transaction of the principal's or client's business, are admissible. This is elementary law and it is useless to cite authorities.

The declaration of a broker as to when the goods were to be shipped, was held admissible in the case of *Eppens v. Littlejohn*, 52 L. R. A. (N. Y.) 811.

We submit that in the case at bar, the statements of the broker, Frankfort, were clearly within the scope of his authority and admissible. He was as much the agent or representative of Drusin as he had ever been; still carried his samples and had been discussing the matter with Drusin.

In closing we will say that the testimony shows conclusively that these were not the goods represented and were practically unmerchantable and that immediately upon discovering this, the appellees returned same to appellants and even went so far as to pay storage charges thereon and that a verdict ought by all means to have been given for the defendant and that this is a just and righteous verdict.

McLAIN, C.

This was a suit instituted by A. & M. Drusin against Hinds Bros. & Co., in a justice of the peace court of Lee county, on open account for goods sold and delivered to them. Appellants obtained judgment in the justice court. Hinds Bros. & Co. appealed to the circuit court of Lee

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county, where judgment was rendered in favor of appellees. Appellants appeal to this court.

After a most thorough investigation of this record, we are of the opinion that the trial judge should have given the peremptory instruction asked by appellants, A. & M. Drusin. *Reversed and remanded.*

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated by the commissioner, the case is reversed and remanded.

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

OCTOBER TERM, 1910.

NATCHEZ, COLUMBIA & MOBILE RAILROAD COMPANY v.
M. A. LAMBERT.

[54 South. 836.]

1. COMMON CARRIERS. *Personal injuries. Carrying passengers beyond station. Liability.*

In the absence of some good reason, it is the duty of common carriers to allow passengers to get off at the proper depot and a failure to do so entitles the passenger to recover at least nominal damages.

2. SAME.

If in any case it is necessary for a passenger train to be pulled away beyond the depot and into its yards, it is the duty of the company to notify passengers of its purpose to return them to their proper landing place and if it fails to do so, it is negligence, and any damages occasioned any passenger as the direct result makes the company liable therefor.

3. CARRIERS. *Personal injuries. Proximate cause.*

A passenger was carried by her station for about three hundred yards, where the train stopped in the railroad yard, without any

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Statement of the case.

notice of the purpose to return to the station, and the passenger voluntarily alighted a few minutes thereafter without any request to be carried back to the station and walked back to the station through the rain, where she waited four hours for a train which she was to take on another road and by getting wet in walking back to the depot caught a severe cold. The train which carried her by the depot backed into the station, in about twenty or thirty minutes after the passenger had alighted, for the purpose of allowing passengers to alight. *Held*, that the running of the train beyond the station was not the proximate cause of any injury and that the passenger was only entitled to recover nominal damages.

APPEAL from the circuit court of Lawrence county.

HON. R. L. BULLARD, Judge.

Suit by Mrs. M. A. Lambert against the Natchez, Columbia & Mobile Railroad Company. From a judgment for plaintiff, defendant appeals.

The appellee took passage on a train of the appellant from Topeka, Mississippi, to Norfield, Mississippi, a junction point with the Illinois Central Railroad Company; it being her intention to connect at the latter point with the Illinois Central train, due about four hours after the arrival of the appellant's train. When the appellant's train reached Norfield, it was raining, and instead of stopping at the depot, where a work train with flat cars was occupying the track, it passed the depot a distance of about two hundred and fifty yards (as was frequently done), intending later to back into the depot. After the train stopped, appellee remained in the coach a few minutes and voluntarily alighted, in the absence of the conductor, without saying anything to him, or making any request to be carried to the depot, and, leaving other passengers in the coach, walked back to the depot through the rain, where she waited in the depot about four hours for her train, and caught a severe cold. Some minutes later, the train did back into the depot, where the other passengers and freight and baggage were discharged. She brought suit, and recovered the sum of four hundred and fifty dollars punitive damages.

Brief for appellant.

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T. Brady, Jr., for appellant.

Appellee lived at or near Topeka, upon appellant's line of railroad; she could reasonably expect to have to make occasional, if not frequent, trips over its road; it was her duty, then, to acquaint herself with its customs, and having ascertained them, she would have had a right to rely upon them. This custom was not contrary to any contract, and the alleged special contract was not contrary to, nor did it in any manner abrogate, the established custom. No duty to appellee, nor any contract with her, was breached by carrying her past the Illinois Central depot to the regular and customary stopping place; no special duty nor special contract was breached until appellant refused to carry her back to the Illinois Central depot. There was no obligation laid on appellant to stop at the Illinois Central depot on its way in, if it later, and in a reasonable time, safely deposited her there. It did carry her by the depot of the connecting line and it would have carried her back in a few minutes, if she had given them time. There was no refusal on the part of the appellant, by word or deed, to carry her back to the depot, no invitation was given to her to alight, and she was at all times treated kindly and courteously, as she unhesitatingly states.

But, being perhaps as far as two hundred and fifty yards from the Illinois Central depot, and having only four hours in which to catch her train for McComb City, and although her fellow travelers were sitting in the coach, appellee waited for a length of time which she estimates to have been as long as five minutes, then, taking her baggage, left the coach of her own free will and accord and started back toward the Illinois Central depot, walking. As a matter of fact, the testimony shows that the passenger train pulled in past the switch-point, the work train pulled out of the siding onto the cleared main-line, yet appellee, traveling down the same track and walking, beat the work train to the trestle.

After setting out its freight cars onto the side track, the passenger train, or the passenger coach and the freight car with the transfer freight, backed down to the Illinois Central depot, as was customary, and as had been the intention of its crew all the time, in order to deposit any passengers for that point, including appellee. In the face of such facts, can appellee now successfully contend that there was "negligence," "wantonness," "wilfulness," "maliciousness," failure of duty or breach of contract on the part of appellant? It fulfilled every obligation laid upon it by law, by custom and by contract, general or special, express or implied. Appellee's own unreasoning impatience was the sole cause of her failure to be deposited at the depot of the Illinois Central Railroad Company as "safe and sound" as when she entered appellant's train at Topeka an hour or so before. Appellant did all that it could to carry out its "contract" except to lock its doors on appellee. She says that she depended on the conductor to put her off, yet she took matters into her own hands at the first opportunity and to her alone are any injurious consequences to be ascribed. Having made it impossible for appellant to carry out the terms of its contract with her, she cannot complain of its having been breached by appellant.

If it is conceded that appellant's conduct was negligent and was a breach of duty to the appellee, then appellee's own hasty and ill considered acts, and not this negligence, were the proximate cause of appellee's getting wet and her subsequent indisposition. She did not have to leave the coach in the first place, which she knew, or should have known, or could easily have ascertained. She was no ignorant, unlettered, untraveled woman, nor a stranger to this vicinity. There was nothing to prevent her remaining in the car until it was backed to the Illinois Central depot, but, once she had left the coach and started back for the depot, appellee should have exer-

Brief for appellant.

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cised sufficiently her eye-sight, hearing and judgment to have chosen a route that would be safest and best. The hour was about 2:30 o'clock on a summer afternoon and, though a light rain was still falling, there was nothing to obstruct appellee's view of her entire surroundings. She had proceeded down the track but a short distance when she came to the point where it crosses a wide path, along which it then runs parallel for some thirty-five feet or more. This path is built up with saw-dust and bark, topped with cinders and about ten feet wide, being a little lower than the track upon which she was walking. There was no good reason why she should not have taken this, since she acknowledges that she saw it, yet she continued to follow the track.

Meanwhile, the work train, its way having been cleared, proceeded down the track. The engineer saw her before she reached the point where the track and path divide and the trestle begins and he at once began whistling to attract her attention as he slowly backed on down at a safe distance. Appellee's hearing seems to have been defective for she did not hear the warning whistles. A very short distance further brought her to the point where the track diverges to the north and left and crosses a low trestle about two hundred feet long. To appellee's right was the wide, well-constructed, well-drained, safe path; immediately in front of her was a high trespass sign, advising the public that it was dangerous to cross that trestle and that those using it did so at their own risk; behind her whistled the work train, whose way she still blocked; yet appellee refused to take the path, which she saw, disregarded the trespass sign, which she should have seen, and deliberately, recklessly and voluntarily chose the walk across the cross-ties of the slippery, unfloored, unrailed trestle, through which, or from which, she might have fallen at any step.

Appellant could not be expected to foresee that the result of its failing to leave appellee at the Illinois Central

depot would result in her choosing the dangerous way across the railroad trestle, when there was a safe way immediately at hand, or that the succeeding train of circumstances would attend her lack of diligence. Appellee's injuries, as connected with appellant's alleged negligence, were indirect, remote and brought about by intervening causes over which appellant had no control and which it did not set in motion. If there had been a forced choice on appellee at the coach and at the trestle, especially at the trestle, the situation would have been different, but appellee's choice was deliberate, and appellant cannot be held responsible for the consequences of her gross negligence and the misguided, though well-meant, efforts of a total stranger.

The rule of damages of which the above is an application is too elementary to require supporting citations, but appellant calls attention to the case of *Dix v. Brown*, 41 Miss. 131.

Magee & McGehee, for appellee.

With reference to whether appellant discharged all the obligations that it owed appellee as its passenger, or was guilty of neglect—and the character and degree of that neglect—and, also, whether appellee acted with ordinary prudence and care, such as was expected of one in her situation, in order to avoid the injury complained of, and to mitigate her damages, was a question which should have been, and was, left to the sound discretion of an impartial jury. Surely appellee could not have been expected to do otherwise than to get off the train where and when she did. Since appellant had failed to stop its train at the station of the Illinois Central Railroad, or to return with appellee within a reasonable time, and she knowing that her train had been switched on a side-track up in the mill yard of the Butterfield Lumber Company, the engine having been cut loose from it and carried beyond the scope of her vision, and the conductor on said

train, although he knew he had carried her beyond her destination, did not come into the coach at all and inform her of the private intention that he might have had to back the train to the depot at some convenient time, the question of the negligence of appellee in choosing to get off rather than remain on the train was a question of fact for the jury. See 44 Miss. 466, 71 Texas 274. No adjudicated case can be found or well considered *dictum* produced, that would tend to hold otherwise.

We do not deny the correctness of the rule of law as enunciated in the case of *Wells v. Railroad Co.*, 67 Miss. 30, cited by appellant, to the effect that the conductor is not, ordinarily, the agent of a railroad company to contract with persons for transportation. We know that he cannot adapt his schedule to suit a passenger's idea of right. But that case cannot under the phase of the case at bar be deemed applicable, for the reason that appellee does not base her right to recovery in this case upon any special contract made with the conductor on appellant's train, but on the contrary she relies upon the general contract imposed by law between any common carrier and the traveling public by which a common carrier is bound to let off its passengers at their appointed destination. Appellee being a passenger on appellant's train, and having paid her fare from Topeka, Mississippi, to Norfield, Mississippi, informing the conductor in due time that she desired to get off at the depot, the Illinois Central depot, the only depot at Norfield, the usual and customary place of letting off and taking on passengers, was entitled to be put off there not as a mere matter of courtesy, but by law, by custom and by right paramount.

There was negligence in passing the station, as the court says in *Kendrick et ux, supra*, for they do not show that it was impossible to have stopped the train at the station, and in the absence of such showing, the court will presume that it was possible for it to have stopped

there; then, if possible, the employees could have stopped it by the exercise of the "utmost care and vigilance." And the slightest neglect or fault, *livissima culpa*, renders the common carrier liable. See *N. O. J. & G. N. R. R. Co. v. Albritton*, 38 Miss. 274.

The record shows that appellees proved everything that was necessary to prove to make out her case in the court below for both nominal and actual damages, and we respectfully submit that the verdict should not be disturbed.

MAYES, C. J., delivered the opinion of the court.

In the absence of some good reason therefor, it was the duty of this railroad company to allow Mrs. Lambert to get off of its train at her proper depot at the very first opportunity that was presented. In this case Mrs. Lambert should have been landed at her proper depot before the train was carried into the yards, and because this was not done she is clearly entitled to nominal damages only. If it was necessary, in any case, for a passenger train to be pulled way beyond the depot and into the yards of the company, it is certainly the duty of the company to notify the passengers of its purpose to return them to their proper landing place, and if it fail to do this it is negligence, and any damage occasioned any passenger as the direct result makes the company liable therefor.

In this case, however, the main injury complained of was not the direct, proximate result of negligence of the company in carrying Mrs. Lambert by the depot, or failing to notify her of their purpose to return the train to the proper depot. It had been raining, and was raining at the time the train pulled into the yards. Mrs. Lambert knew this, and although she had four hours to wait after she reached the depot before the train she was to take over the Illinois Central Railroad to McComb City would arrive, she got out of her coach into

the rain and slush, and undertook to walk back some two hundred or three hundred yards to the depot. It was getting off of the train and going into the rain that made her ill and caused the damage for which she sues. When she got off, the train had only been there a few minutes, and in twenty or thirty minutes the train was carried back to the depot for the purpose of allowing passengers to get off there. She had ample time to wait, and made no effort to have the train carry her back. She was at the terminus of the road, and knew that she could not be carried further. We do not think she was entitled to recover more than nominal damages, and the court should have so instructed.

Reversed and remanded.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY v.
HENRIETTA WOODHAM ET AL.

[54 South. 890.]

1. INJURIES. *Proximate cause. Negligence.*

Where a defendant is negligent and his negligence combines with that of another, or with any other independent intervening cause, he is liable, although his negligence was not the sole negligence, or the sole proximate cause, and although his negligence without such other independent intervening cause would not have produced the injury.

2. SAME.

Negligence resulting in injury is the proximate cause thereof and creates liability therefor, where the negligence is of such a character that, by the usual course of events, some injury, not necessarily the particular injury, or injury received in the particular manner complained of, would result therefrom, provided the attendant circumstances are such that an ordinarily prudent man ought reasonably to have anticipated that some injury would probably result from the act done.

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Brief for appellant.

APPEAL from the circuit court of Jackson county.

HON. GEORGE S. DODDS, Special Judge.

Suit by Henrietta Woodham et al. against the Cumberland Telephone & Telegraph Company et al., for the death of her husband. From a judgment for plaintiff for twenty thousand dollars defendant appeals.

The facts are fully stated in the opinion of the court.

Harris & Potter, for appellant.

The definition of negligence given by Shearman & Redfield (sec. 3), is: "Negligence, constituting a cause of civil action, is such an omission, by a responsible person, to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury, as in a natural and continuous sequence, causes unintended damage to the latter. And in section 5, "A natural and continuous sequence uninterruptedly connecting the breach of duty with the damage, as cause and effect," and in section 26, "The breach of duty upon which an action is brought, must be not only the cause but the proximate cause of the damage to the plaintiff." "The proximate cause of an event must be understood to be that which in a natural and continuous sequence unbroken by any new independent cause produces the event."

This case falls short of this definition and lacks essential elements stated as being necessary to create a cause of action founded on tort.

The jury here complained of what was not a natural continuous sequence uninterruptedly connecting appellant's conduct with the damage, but was interrupted and broken by the removal of danger in cutting off the power. Appellant's conduct was not the cause, certainly not the *causa causans* of the death. The breach of duty was that of the light plant who alone had the means of making the venture arranged and undertaken by Mr. Woodham safe. An independent intervening cause produced

the injury. Turning on the power was the proximate cause of the injury. Anderson's Law Dictionary defines the proximate as "The nearest immediate and direct cause; the efficient cause; the cause that sets another or other causes in operation; the dominant cause." "The proximate cause is the dominant controlling one and not those which are mere incidents." Words and Phrases.

Mr. Woodham saw and comprehended the danger of the situation that had been brought about by the negligence of appellant; he was then in no danger of personal injury; his only fear was that his house might be burned. In this situation he made arrangements with the light plant and imposed a special duty upon them not to turn on the dangerous current while he undertook to protect his property.

At this time he knew there was no duty that could be performed by appellant, and that his only danger of personal injury was his own imprudence or from gross neglect and a disregard of a high duty by the persons in charge of the light plant, who had impliedly agreed to protect him. He assumed the risk of their injuring him. *Fowles v. Briggs*, 40 L. R. A. 528; *Griffin v. Light Co.*, L. R. A. 318.

If he then relied upon appellant, who he knew was helpless, to serve him, it was certain personal injury or death to come in contact with the wire, and Mr. Woodham could not rightly take so great a personal risk in order to save his house and his negligence in so doing would be the proximate cause of his injury. *Seal v. Ry. Co.*, 65 Texas 274; *Cook v. Johnston*, 58 Mich. 437; *Cordiff v. Ry. Co.*, Has. 260; *Morris v. Ry. Co.*, 148 N. J. 186; *McMonamee v. Ry. Co.*, 135 Mo. 440; *Crawley v. Ry. Co.*, 70 Miss. 340.

Even if he had been justifiable in attempting to save his house, there was no danger to his person or property that confronted him at the time he voluntarily went into the street to clear it of a live wire, or one that he knew

would be alive and dead if the power was turned on from the light plant.

The court will see from the evidence that after danger was discovered by Mr. Woodham, and when he was in no danger of personal injury, he called up the electric light plant, told them of the situation and requested that the power be turned off. At this time he knew appellants were helpless to protect him and he engaged the services of the only one who without delay could relieve the situation. Manifestly the light plant management owed him a high degree of care and a duty not to injure him or his property, and Mr. Woodham relying wholly and alone upon them for his protection in his undertaking, and knowing the consequences if they should fail in this duty and turn on the power, cut the wires from his house and after that undertook to remove the same from the street, when the power was (to say the least) negligently turned on and he was killed. Mr. Woodham's conduct and the turning on of the power by the light plant were two independent intervening acts of negligence and the failure of the light plant to observe its plain duty was the proximate cause of the injury.

We call the court's attention to the case of *Cole v. German Sav. & L. Soc.*, sec. 63, L. R. A. 416, where the question of intervening cause is discussed and numerous authorities cited. *Tuteen v. Hurley*, 98 Mass. 211; *Railway Co. v. Quick*, 125 Ala. 553; *Wharfboat Assn. v. Wood*, 64 Miss. 661; *Meyer v. King*, 72 Miss. 1; *Ry. Co. v. Woolley*, 77 Miss. 927. In the case of *Griffin v. Light & Power Co.*, 55 L. R. A. 318, the court says: "The limitation of the rule, as we understand it, is that there shall be no intervening human agency which might have averted the injury or furnished protection."

"The relation of cause and effect cannot be made out by including the independent illegal acts of third persons. A man may be justly held responsible for the necessary or ordinary legitimate consequences of his own

acts, and such consequences may include in the chain of causes which connect the original act with the final effect, but he cannot be made accountable for the unauthorized illegal acts of other persons, although his own conduct may have indirectly induced or incited the commission of the acts." *Olmstead v. Brown*, 12 Barber 662.

"The test of proximate cause is whether the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that the final result cannot be said to be the natural and probable consequence of the primary cause." Words and Phrases.

The maxim of the law here applicable is, that in law the immediate and not the remote cause of any event is regarded, and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not to the remote cause. The explanation of this maxim may be given thus. If the injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury follows as a direct and immediate consequence, the law will refer the damage to the last proximate cause and refuse to trace it to that which was more remote. The chief sufficient reason for the rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences with some degree of assurance but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile." *Cooley on Torts* (3d Ed.), p. 99.

"If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause and not to that which was more remoté." Cooley on Torts (3d Ed.), p. 103.

"Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? The question must be answered in the negative, for the general reason that causal connection between negligence and damage has been broken by the intervention of independent responsible human action. I am negligent on a particular subject matter. Another person moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. Wharton on Negligence, § 134.

"We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not where there is a sufficient and independent cause operating between the wrong and the injury. In such case the resort of the sufferer must be to the originator of the intermediate cause." *Ry. Co. v. Kellogg*, 94 U. S. 469; *Tuten v. Hurley*, 98 Mass. 211; *Glassey v. Ry. Co.*, 185 Mass. 315; *Andrew & Co. v. Kinsel*, 114 Ga. 390; *Williams v. Woodward Iron Co.*, 106 Ala. 254; *Raddick v. Chemical Co.*, 124 Ill. App. 31; *White's Sup.*; *Thompson on Negligence*, § 54; *Cuff v. Ry. Co.*, 30 N. J. L. 17; *Afflick v. Bates*, 21 R. I. 281.

In the case of *Ry. Co. v. Cathey*, 70 Miss. 337, Judge Campbell says: "It is not enough that negligence of the

employer and injury to the employee co-existed, but the injury must have been caused by the negligence; and the fact that injury to an employee accrued after the negligence is not sufficient to show the relation of cause and effect between them. *Post hoc ergo propter* is not sound as evidence or argument. Nor is it sufficient for a plaintiff, seeking to recover for alleged negligence by an employer towards an employee, to show a possibility that the injury complained of was caused by negligence. Possibility will not sustain a verdict. It must have a better foundation."

It appeals to us, an impossible legal proposition, that where a man making a dangerous venture has arranged with a second party for his protection, and that party owing him a duty not to negligently do him harm, flagrantly disregards this duty and thereby produces injury that a third party should be held liable because of an act, then only made dangerous by such negligent act of the second party.

The question of proximate and remote causes are involved and discussed in the foregoing authorities. We feel confident that no case can be found that would justify the holding that the conduct of appellant was the proximate cause of the calamity shown by this record, and that the peremptory instruction asked by appellants should have been given.

Denny & Denny and Alexander & Alexander, for appellees.

Relying on the definition of negligence that is referred to in appellant's brief, quoted from section 3, Shearman & Redfield: "Negligence constituting a cause of civil action is such an admission by a responsible person to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury, as in a natural and continuous sequence causes unintended damage to the latter," we will

analyze the acts of the appellant company. We cannot deny that "the breach of duty upon which an action is brought must be not only the cause, but the proximate cause of the damage to the plaintiff." Section 26, *Shearman & Redfield* (quoted by counsel for appellant). But, "the proximate cause of an event must be understood to be that which in a natural and continuous sequence unbroken by any new independent cause produces the event, and without which that event would not have occurred. Proximity in point of time or space, however, is not part of the definition." This case does not, as counsel contend, fall short of these definitions, or lack any of the essential elements necessary to create a cause of action founded on torts. For any act to be negligent such act or omission must be such as would reasonably produce some damage or injury. The negligence of the defendant company was negligence because the telephone wire, which was constructed and left in a dangerous place, was very likely to and did come into contact with the wire containing a death producing current of electricity.

The event which happened as a result of this negligence, although one which could reasonably have been anticipated and which was the natural and probable result of such negligence as that of the defendant company, should not, as counsel for appellant contend, hold the defendant company liable because the negligence of Mrs. Burnham was an "efficient intervening cause." For an intervening cause to relieve a negligent defendant, it must be an "independent cause" which could "stand alone" as the "sole ground" of the injury, which could not be "reasonably anticipated" as a result of the original negligence, and which must be "extraordinary," "unforeseen," "self-operating" and "so remote that it could be held the direct cause of the injury."

First: Let us discuss the general proposition of intervening causes.

The mere fact that there may have been intervening causes is not sufficient in law to relieve the former from liability. Plaintiff's injuries may yet be natural and proximate in law, although between the defendant's negligence and the injuries, other causes, conditions, or agencies have operated, and when this is the case defendant is liable." 21 Am. and Eng. Ency. Law, p. 490, and exhaustive list of cases cited.

While there are some loose expressions that an "intervening cause" is one that can be anticipated, the expression is not precise. Nothing is better settled than the rule that one is bound to anticipate "negligence, the result—that is the injury to some one in some way with or without concurring negligence, is all that must be anticipated."

It is further noted that it is not necessary to anticipate that the "particular" injury will occur.

"Where an act is negligent, it is not necessary to render it the proximate cause that the person committing it could or might have foreseen the particular consequence or precise form of the injury, or the particular manner in which it occurred, if by the exercise of reasonable care it might have been foreseen or anticipated that some injury might result." 29 Cyc. 495, and cases cited.

"In order to relieve the defendant from liability, the intervening act must be the sole cause of the injury to plaintiff." *Quill v. N. Y. C. & H. R. R. R. Co.*, 16 Daley (N. Y.) 313.

Further, courts have said that the intervening act of negligence must be of an "unusual, unexpected, extraordinary character." *Schwartz v. Achill*, 45 W. Va. 405; *Carter v. Towne*, 103 Mass. 505; *Moore v. Brown*, 11 N. Y. 318.

"It will be the same even if defendant's negligence is a condition instead of an act, and if the negligence of defendant supplied conditions, by which the subsequent act, the occurrence of which might have been foreseen,

was dangerous and hurtful, the defendant is liable." *Meade v. Chicago, etc., R. R. Co.*, 68 Mo. App. 92; *Lundeen v. Livingston Electric Railroad Co.*, 17 Mont. 72; *Detzur v. Stroh Brewing Co.*, 111 Mich. 282; *Wilder v. Stanley*, 65 Vt. 145; *Postal, etc., Tel. Co. v. Zofti*, 93 Tenn. 369.

"The test is not to be found in the number of intervening acts, but in their character, and in their natural connection between the wrong done, and the injurious consequences, and if the result is attributable to the original negligence, which might have reasonably been foreseen as probable, the liability continues. 29 Cyc. 499, and cases cited.

"Such new force must be sufficient to stand alone as the cause of the injury." *Peoria v. Adams*, 72 Ill. App. 662. See *Yazoo City v. Birchett*, 89 Miss. 700, on "proximate cause: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain, or as the oft cited case of the squib in the market place." *Milwaukee, etc., R. R. Co. v. Boon*, 95 U. S. 177, 24 L. Ed. 395.

"The inquiry must therefore always be, whether the efficient cause if such there was, was disconnected from the primary cause and self-operating, which produced the injury." *Milwaukee Electric Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256.

"The test is, was it a new and independent force, acting in and of itself in causing the injury, and superseding the original wrong complained of." *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65.

"There is indeed no better rule settled in the present connection than that in order to render defendant liable his negligence need not be the sole cause of the injury." 21 Am. and Eng. Ency. Law, pages 495 and 496, and cases cited. 29 Cyc., pages 487 and 488.

If, as we contend the negligence of the Burnham plant was only a concurring act of negligence, the defendant company will be held liable.

When two negligent acts concur to produce an injury both or either are liable. *L. N. A. & T. R. R. Co. v. Lucas*, 6 L. R. A. (N. S.) 193, and notes; *Village of Carterville v. Cook*, 4 L. R. A. 721.

"If I am guilty of negligence in leaving anything dangerous in a place, where I know it will be probable that some other person will unjustifiably set it in motion to the injury to a third person, and if that injury be brought about, I presume that the sufferer will have redress by action against both or either of the two, but unquestionably against the first."

Says the court in *Lynch v. Nurdin*, 1 Q. B. 39: "And even in cases where the negligence of both parties was necessary to produce the injury, in such cases neither can be relieved from liability on the ground that his negligence was not the proximate cause. In cases of combined negligence each party guilty of negligence, is liable for the result." 77 Texas 360; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Ricker v. Freeman*, 50 N. H. 432.

"In cases where the injury was the result of two concurring causes one party is not exempt from liability, although another party was equally liable." *Lake v. Williams*, 62 Me. 243, 16 Am. St. Rep. 456.

"Where an act unlawful in itself, the wrongdoer may be liable, even though other causes may have arisen that contributed to the injury. Where such an act is done from which an injury may be reasonably expected to result, when the injury occurs, it will be traceable back to the original negligent act, and hold the original wrongdoer liable. *Weick v. Lander*, 75 Ill. 96.

"The proximate cause of an injury is that which immediately causes, and without which the injury would not have happened, notwithstanding other omissions or

causes concurred therewith." *Miller v. Kelley Coal Co.*, 145 Ill. App. 452.

"Negligence is the 'proximate cause' of an injury, if it appears that the injury would not have happened but for the negligence." *Yeates v. I. C. R. R. Company*, 89 N. E. 338.

"And need not be the nearest cause in the matter of time." *Ib.*

We have at some length discussed the general rule governing "intervening causes" to show the tendency of the courts in determining what negligent acts intervening would relieve original defendants from liability. At this time it is needless to discuss this case in the light of these authorities further. However, we will add that whether or not an act is the proximate cause of an injury is for the jury to determine unless the evidence in the case will clearly and beyond a doubt show that the intervening act was alone the cause of the injury, and not such an act as could be reasonably anticipated and foreseen, etc.

"The true rule is, what is the proximate cause of an injury is ordinarily for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact from the circumstances of fact attending it." *Milwaukee, etc., R. R. Co. v. Kellogg*, 94 U. S. 469, 24 Law Ed. 256; *Mo. P. R. Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. 925. See, also, *Reed v. Evansville, etc., R. R. Co.*, 53 Am. St. 391; *Isham v. Dow*, 67 Am. St. 691.

In order to get before the court our contentions and constructions of the facts as set out in this record, to show that the act of the electric company was not such an intervening efficient cause, as to relieve appellants, we cite herewith certain cases of fact, which have been held not to be "efficient intervening causes." *Brown v. C. & O. R. R. Co.*, 123 S. W. 298; 1907 Am. Digest, p. 3702, 99 S. W. 181; *Rolluston v. Cassier & Co.*, 59 S. E. 442; *Hughes v. Harbour Suburban Bldg. & Sav. Assn.*;

see especially *Yazoo City v. Birchett*, 89 Miss. 700, 115 N. V. S. 320; see vol. 6, Key Number Series, Am. Digest, 1777.

The case of *Cole v. German Savings & Loan Society*, 63 L. R. A. 416, so strongly relied upon by counsel for appellant, is clearly not in line with the case at bar.

In order to illustrate our contention further, we have endeavored to collect similar and almost identical cases to the one involved, and herewith cite a few electrical cases which alone should control this court's decision. *Damenhower v. Western Union Tel. Company*, 218 Pa. 216; Am. Electrical cases, vol. 9, p. 1063; *Toledo R. R. Company v. Rippon*, 20 Ohio St. Rep., p. 561; 9 Am. Electrical cases 527, 141 Mich. 298; *Citizens Telephone Co. v. Thomas*, 45 Tex. App. 20; *Ib.*, vol. 9, Am. Electrical cases, 952 *et seq.*; *Home Telephone Company v. Fields*, 150 Ala. 306; *Ahern v. Oregon Telephone Company*, 24 Ore. 276; *City Electric St. R. R. Co. v. Connery*, 61 Ark. 381; *Twist v. Rochester*, 55 N. Y. Supp. 850; *San Antonio Gas, etc., Co. v. Speegle*, 60 S. W. 884; *Herbert v. Lake Charles Ice & Waterworks Co.*, 64 L. R. A. 101, 11 La. 522; *Harrison v. Kansas City Electric Light Co.*, 7 L. R. A. (N. S.) 293; see L. R. A., vol. 24 (N. S.) 978; *Smith v. Mo. & Kan. Tel. Co.*, 113 Mo. App. 429.

We wish especially to call the court's attention to this essential fact that the telephone company was fully aware, not only that the telephone wire was in close proximity to the electric light wire, but they knew that it had actually come into contact with the heavily charged light wire. See the testimony of Miss Gertrude Fellows (Rec., page 68). Not only did the company therefore allow its wires to remain dangerous and its poles to remain rotten, but took no steps whatever to prevent the injury after full knowledge that the wires were crossed. Surely it was sufficient negligence for the company to allow wires day in and day out to remain so negligently constructed and in such close proximity to the light wire,

but it was an act of gross negligence not to use every means in their care to prevent the injury after they had full knowledge of the contact between the wires.

We feel confident that the cases which we have cited and the excellent list of cases included in the note to the case of *Seith v. Commonwealth Electric Company*, 24 L. R. A. (N. S.) 978, will justify the holding that the defendant company is liable as shown by this record.

We again remind the court that in this case the question of proximate cause was left to the jury, and was a question of fact, but in any event the peremptory instruction asked by appellants should not have been given, and that under the general principles of law applicable in such cases, this case should be affirmed.

SMITH, J., delivered the opinion of the court.

This suit was instituted in the court below by appellees to recover from appellants, Cumberland Telephone & Telegraph Company and Mr. Renfro, its manager, damages for the death of Mr. R. A. Woodham, the husband of Mrs. Henrietta Woodham and the father of the other appellees. From a judgment in appellee's favor, this appeals is taken.

Appellant company was operating a telephone system in the town of Escatawpa, and Mr. Woodham, a resident thereof, was one of its subscribers. Mr. H. M. Burnham owned an electric light plant that supplied lights for this town. Mr. Woodham's residence was on Straight street, and the primary electric light wire of the electric light plant ran along the same side of the street on which his residence was situated. The line of the telephone company was on the opposite side of the street, having one of its posts across the street, and nearly opposite Woodham's residence. From this post the telephone line crossed the street above the electric light wires, and entered the residence of Mr. Woodham. The distance between these wires was variously estimated at from three

to twenty inches. This telephone pole had become very much decayed at the surface of the ground, and on the occasion in question, there having been some rain and wind, broke at the ground, and the telephone wires and the light wires came in contact, thereby creating a short circuit to the Woodham telephone. Mrs. Woodham, hearing a sharp snapping and seeing flashes of fire from the dining room, where the telephone was located, had her husband called; and he, seeing the danger, at once notified the electric light people of the situation, and requested that the lights be cut off, so that he might remedy the matter. This was done, and thereupon Woodham cut the wires from his house, and was attempting to clear his yard and the street thereof, when the current was again turned on, at the instance of the wife of the proprietor of the electric light plant, the proprietor himself being absent, and he received a shock by which he was immediately killed. Appellants had no control over the electric light plant, and had nothing to do with the turning on of the current. In this state of facts, appellants contend that they were entitled to the peremptory instruction in the court below, on the ground that their negligence was not the proximate cause of Mr. Woodham's death, but that the proximate cause of his death was an intervening independent act of negligence on the part of a third person, to wit, the turning on of the electric light current without warning Woodham after it had been, at his request, cut off.

Without attempting to define proximate cause in such terms as will be applicable to all states of fact—for to do so is practically impossible—it will be sufficient to say that the negligent act of a person, resulting in injury, is the proximate cause thereof, and creates liability therefor, when the act is of such character that, by the usual course of events, some injury, not necessarily the particular injury, or injury received in the particular manner complained of, would result therefrom, provided the

attendant circumstances are such that an ordinarily prudent man ought reasonably to have anticipated that some injury would probably result from the act done. In order that a person may be liable for damages resulting from his negligence, it is not necessary that his negligence should have been the sole cause of the injury. His negligence may be the proximate cause, where it concurs with one or more causes in producing an injury, and, although the author or authors of such cause or causes may also be liable therefor. 29 Cyc. 492-496, inclusive, and authorities there cited. "If a defendant is negligent, and this negligence combines with that of another or with any other independent intervening cause, he is liable, although his negligence was not the sole negligence, or the sole proximate cause, and although his negligence, without such other independent intervening cause, would not have produced the injury." *Susie B. Harrison v. Kansas City Elec. Light Co.*, 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293.

It is true that appellants could not have anticipated that the particular injury complained of would have resulted from their negligence, or that the injury would have occurred in the particular manner in which it did; but they could, and ought reasonably, have anticipated that some injury would result therefrom. When the telephone wires came in contact with the electric light wires, the necessary result thereof was that electricity of dangerous power might be conducted into the residence of Mr. Woodham: That the light wires were not charged with the current at all times, and that the current was turned off and then on again by the owner of the electric light plant, after a discovery of the condition brought about by appellant's negligence, is immaterial. The fact that the current was turned off and then on again relates simply to the question of Woodham's contributory negligence. It may be that appellant's negligence is not the sole cause of the death of Mr. Woodham, but

by it a condition was brought about dangerous to both life and property, and which, combined with the negligence of another, did cause the death of Mr. Woodham. It is true that where the negligent act of a defendant is simply the *causa sine qua non*, and the negligence of a third person is the *causa causans* of an injury, such defendant is not liable in damages therefor; but where the negligence of a defendant results in a condition dangerous in itself, such as an ordinarily prudent person ought to have anticipated might occur, he is liable for any damage resulting therefrom, even though the particular injury complained of would not have resulted, had not the negligence of a third person combined with his.

Through the negligence of appellants, Mr. Woodham's residence was about to be destroyed, and members of his family were in danger of being injured by coming in contact with wires charged with electricity. It became necessary to quickly remedy this situation, and in attempting to do this, which he had a perfect right to do, and ought to have done, provided he exercised due care in so doing, Mr. Woodham was killed. The fact that the danger was temporarily removed, when the current was turned off, did not relieve appellants of the effect of their negligence. If Woodham had not succeeded in removing the wires, and his residence had burned, or some member of his family had been injured when the current was turned on, appellants would, of course, have been responsible for the damage resulting therefrom. It could not, in that event, have been said that the negligence of appellants was not the proximate cause of the injury. How, then, can it be said that their negligence was not the proximate cause of the injury received by Woodham in attempting to remove the danger to his property and family, occasioned by their negligence? Should authorities other than those hereinbefore cited be required to sustain the foregoing views, they will be found collated in the briefs of counsel.

99 Miss.]

Brief for appellant.

The court committed no error in refusing a peremptory instruction requested, and the judgment is affirmed.
Affirmed.

MRS. PEARL COLE v. A. J. COLE.

[54 South. 953.]

1. **PRE-NUPTIAL CONTRACTS.** *Parol evidence. Identification.*

While pre-nuptial contracts are to be construed liberally in favor of the wife, this should not be so extended as to overturn the statute of frauds.

2. **PAROL EVIDENCE.**

The rule is that if the description contained in the writing points to specific property, parol evidence is admissible to identify it because that is certain which is capable of being made certain.

3. **SAME.** *Statute of frauds. Insufficient description.*

Under Code 1906, section 4775, requiring a contract in consideration of marriage or to sell lands to be in writing, a contract in consideration of marriage to convey either one of four tracts of land worth twenty-five hundred dollars each and owned by the husband without other description is void for uncertainty in description.

APPEAL from the chancery court of Chickasaw county.
HON. J. Q. ROBBINS, Chancellor.

This is a bill by Mrs. Pearl Cole against A. J. Cole asking the enforcement of a prenuptial agreement in regard to the conveyance of land. From a decree dismissing the bill plaintiff appeals.

The facts are fully stated in the opinion of the court.

Joe H. Ford, for appellant.

The court sustained the demurrer on the ground that the land which was to be deeded to the appellant is not

sufficiently designated in the letters which constituted the ante-nuptial contract between them to base a decree of specific performance upon and that said contract is therefore void under the Statute of Frauds, Code 1906, section 4775.

1. It will be noted that the proposition of appellee to appellant is embraced in two letters. In the first letter he simply stated to her that if she would marry him, he would make her a deed to a piece of land which is worth twenty-five hundred dollars. In the second letter, he states to her that he owns only four tracts of land, but that either one of them is worth twenty-five hundred dollars, and if she will marry him, he will take her to look over these four tracts of land and she may take her choice of them, and he will make her a deed conveying to her the tract which she chooses. She both before and after the marriage made known to him her choice, which was the land sued for.

In my opinion this was sufficient. Suppose he had said to her: "I own only four tracts of land; now, if you will marry me, I will make you a deed to them all." Could it be said the contract would have been void and unenforcible because it did not describe the four tracts by metes and bounds? Then, again, to make the case still plainer, suppose he had made her a deed in consideration of marriage, reading to "all the land which I own." Would the court hold that deed to be void because the description was insufficient?

This court held in *Watson v. Duncan*, 84 Miss. 763, 37 South. 125, that description in an ante-nuptial contract as "You can will your property as you want to any persons," good, and the contract enforceable.

And it held in *Stevenson v. Renardet*, 83 Miss. 392, 35 South. 576, that the description of property in a contract as "all the property which she now owns" was good and enforceable. That was a marriage contract of the same character as the one involved in this case and that con-

tract was enforced after the wife's death and at the suit of her representatives.

Now, how much stronger and clearer is the description of the property involved in the case last above cited than the one at bar? Not one whit. Appellee simply said to appellant in effect: "I own four tracts of land. They are all the land I own now. Now if you will marry me, I will deed you your choice of these four tracts." She accepts his proposition, marries him and makes her choice known to him and he then deliberately refuses to do what he contracted to do. Of course in order to show what four tracts of land appellee owned it would be necessary to resort to parcel or extrinsic evidence just as it would be in the cases of *Watson v. Duncan* and *Stevenson v. Renardet*, *supra*, to show what land and property the contracting parties in these cases owned. But the fact that four tracts were all the land he owned at the time of writing the letters is shown by the letter—the letter itself. All you have to do is to make application of the language and the description in the letter to the four tracts of land appellee at the time actually owned, and that the tract set out in the bill is one of them and the choice of appellant. This is what was decided in *McGuire v. Stevenson*, 42 Miss. 724, one of the cases relied upon as authority by counsel for appellee before the chancellor. Extrinsic evidence would have construed and applied the description in the letters and showed the meaning of the words used therein. Certainly then, this is sufficient when such evidence should be introduced. 20 Cyc. 270; *McGuire v. Stevens*, 42 Miss. 724; *Doolittle v. Blakesley*, 4 Day 265 (Conn.), 4 Am. Dec. 218; *Doty v. Wilder*, 15 Ill. 407, 60 Am. Dec. 756; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Meade v. Parker*, 115 Mass. 413, 15 Am. Rep. 110; *Becker v. Becker*, 241 Ill. 423, 89 N. E. 737, 26 L. R. A. (N. S.) 858; *Stevenson v. Renardet*, 83 Miss. 392, 35 South. 576.

To sustain the demurrer was to cut off from the introduction and benefit of extrinsic evidence to "construe and apply the terms of the writing." Extrinsic evidence would show beyond all question where these four tracts are which he said were all he at the time owned, as charged in the bill.

2. I think therefore that the description is sufficient for any kind of a contract. But it must be borne in mind that the contract attempted to be enforced here is an antenuptial or prenuptial contract, and is a suit between the original parties to the contract. Here the prospective husband makes a proposition in writing if the intended wife will marry him, he will make her a deed to one of his four tracts of land, he being the owner of only four, she to have her choice of them. She believes what he says, makes known to him her choice, and then in good faith marries him, believing him to be honest and worthy of her trust. She fully performs her contract and all that remains to complete it is for him to make her a deed. This he faithlessly fails and refuses to do. The authorities are uniform that marriage is the greatest consideration that one can give. Certainly the court will be slow to refuse to enforce a contract of this kind. All the authorities hold that antenuptial contracts should be liberally construed. *McNutt v. McNutt*, 2 L. R. A. (Old Series), 372 (Ind.); *May v. May*, 7 Fla. 207, 68 Am. Dec. 431; 14 Am. and Eng. Ency. Law (1st Ed.), p. 550; *Garvin v. Gordon*, 38 Miss. 205; *Stevenson v. Renardet*, 83 Miss. 392, 35 South. 576; note to *Merritt v. Scott*, 50 Am. Dec., page 373.

Leftwich & Tubb, for appellee.

(1) It will be observed that the Statute of Frauds, chapter 134, section 4775, Code of 1906, comes directly into play. The language we rest upon is as follows:

"An action shall not be brought whereby to charge a defendant or other party upon any agreement made

upon consideration of marriage, mutual promises to marry excepted, . . . unless the terms of agreement upon which such action may be brought or some memorandum or note either of which shall be in writing signed by the party to be charged therewith or some person by him or her thereunto lawfully authorized."

This statute was intended to prevent frauds and perjuries, and there is no instance in which frauds and perjuries are more likely to prevail than that of marriage agreement or contracts and settlements, where alienation afterwards takes place, and there is no relaxation of the rule in antenuptial agreements as far as we have been able to discover. 21 Cyc. 1243, 1244, 1271.

That part of the statute in the following words, "mutual promises to marry excepted," simply refers to the reciprocal promises to marry made face to face by the man and woman which is enforced on public policy, and has no reference to the agreement on the part of either spouse to convey the other property in consideration of the promise. This provision of the statute almost universally prevails in common law countries and states, and under it everywhere oral promises to convey land or property in consideration of marriages are held void. *Hunt v. Hunt*, 59 L. R. A. 306; *Chase v. Fitts*, 132 Mass. 359. Innumerable cases could be cited, but these are sufficient.

(2) Marriage is not such a part performance as takes the case out of the statute. *Peck v. Peck*, 11 Amer. State Rep. 244; *Hunt v. Hunt*, *supra*, and note thereunder; *McNulty v. McNulty*, 120 Ill. 26.

(3) Specific performance in equity is a proper remedy but all the rules hedging in and limiting that remedy must apply, and it must be always understood that the matter of specific performance of agreement rests largely in the discretion of the trial court, and a decree of the trial court will not be reversed save for abuse of discretion. We concede that the premises may be couched

in the form of letters but such letters must sufficiently and clearly set forth the terms of the agreement, so that they will satisfy the statute. 21 Cyc. 1244 and cases.

There must be absolute certainty in all the parts of the agreement. *Stoddard v. Tuck*, 5 Md. 18; *Preston v. Preston*, 95 U. S. 200, 24 L. C. R. 494; *Austin v. Robinson*, 49 Miss. 348; Brame & Alexander's Digest, 936.

In *Austin v. Robinson*, *supra*, the following language is used in the Digest, *supra*: "The jurisdiction to enforce specifically a contract, though said to rest on judicial discretion, is exercised in accordance with sound and fixed rules. The agreement must be certain and mutual, not hard and unconscientious, must rest on a consideration, and performance must be necessary and practicable; it is also necessary that the remedy at law by damages be inadequate.

In *Preston v. Preston*, Justice Field uses the following language: "It is a familiar rule in this branch of the law that a contract, which a court of equity will specifically enforce, must be certain as well as fair in its terms; and the certainty required has reference both to the description of the property and the estate to be conveyed. Uncertainty as to either, not capable of being removed by extrinsic evidence, is fatal to any suit for a specific performance."

The subject-matter of the contract in all bills for specific performances must be definitely described, and there must be no uncertainty or patent ambiguity on the face of the instrument. Some of the courts have said that prenuptial contracts are liberally construed in favor of the wife, but this only means that the court is not very technical in dealing with the crude language liable to be used in unstudied letters and writings, and does not mean that the statute of frauds and perjuries can be set aside and ignored. Complainant's counsel in his brief cites *Watson v. Duncan*, 84 Miss. 763, and *Stevenson v. Renardet*, 83 Miss. 392, but in neither case was there a

question of the definiteness of description required in agreements for the conveyance of lands, which is raised and decided in this case.

Complainant's counsel cites several cases from other states which are not strictly in point, but the very states from which these cases are cited and numerous others which can be cited, have engrafted such exceptions on the statute of frauds as to almost emasculate it, and this court will observe that from the very beginning the courts of the state of Mississippi have held strictly to the spirit as well as to the letter of the statute of frauds, and by so doing we have been saved endless confusion and have imposed certainty upon the laws of the state. The liberal construction that the courts speak of, and referred to by Judge Calhoun in *Stevenson v. Renardet*, is nothing more than an expression of indulgence for crudeness and in artificiality in the writing upon which is based the recovery and no court has as yet intimated that it is willing to set aside a positive statute as wholesome as the statute of frauds in construing marriage settlements. Our own courts have dealt fully with this question, and we need not leave our state to finally settle it, as we believe. *Allen v. Bennett*, 8 S. & M. 672; *Swayze v. McCrossin*, 13 S. & M. 317; *McGuire v. Stevens*, 42 Miss. 724; *Holmes v. Evans*, 48 Miss. 247; *Fisher v. Kuhn*, 54 Miss. 480; *Bowers v. Andrews*, 52 Miss. 606; 20 Cyc. 270, note 70, and cases.

ANDERSON, J., delivered the opinion of the court.

The appellant, Mrs. Pearl Cole, filed a bill against her husband, A. J. Cole, the appellee, for the specific performance of a prenuptial contract to convey her certain lands, owned by him, in consideration of marriage. The appellee demurred to the bill, which demurrer was sustained, and, appellant declining to amend her bill, the same was dismissed, from which she prosecutes this appeal.

The substantial averments of the bill are as follows: That the consideration for appellant's marriage to the appellee was a prenuptial promise by the latter to convey to appellant one of four tracts of land owned by him, to be selected by her. That this contract is embodied in two letters, one of which was written February 17, 1909, and is as follows:

“Houlka, Miss., Feb. 16, 1909.

“Miss Pearl Cole—

“Dear Miss: I received your most kind and welcome letter. Oh, how glad I was to hear from you. I have no news to tell you. I wrote you a letter last Saturday, the 13th. I hope you have got it. Miss Pearl, your Pa and Ma do not want you to marry no one. If I was in your place, I would pay no attention to what they say about marrying. If you will stick to me, you will come away from there. I have got plenty of money to take care of you after I get you. I will make you a deed to a piece of land is worth twenty-five hundred dollars after we marry. Miss Pearl, I will be at your house this coming Sunday. Be sure and be at home. I will freely give my life for you. I love you better than any lady I ever saw. Be sure and write as soon as you get this note. I will come to a close. Miss Pearl, I am the best friend you have got on earth.

“A. J. COLE.”

That the other letter, which was lost and for that reason could not be produced, was written on the 24th of February, 1909, in which appellee stated that, if appellant would marry him, he would make her a deed to either one of four tracts of land owned by him, which was all the land he owned, each tract worth two thousand and five hundred dollars, she to select the one she desired a deed to. That thereupon, in consideration of the terms contained in said letters, they were married and lived together about fourteen months, when the ap-

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pellee "deliberately carried her home and refused to live with her further." That it was understood and agreed between the appellant and the appellee, both before and after they were married, that her choice of his four tracts of land was one in Chickasaw county, described in the bill. That after their marriage the appellant frequently demanded of the appellee that he comply with his promise to convey her said tract of land, which he refused to do.

The demurrer raises the question whether the contract evidenced by these letters is within the statute of frauds (section 4775, Code of 1906), which declares void contracts in consideration of marriage and contracts for the sale of land, unless such contracts are in writing, signed by the parties sought to be charged. Clearly the letters themselves did not certainly identify the land. The rule is, however, that if the description contained in the writing points to specific property, parol evidence is admissible to identify it, because that is certain which is capable of being made certain. In 20 Cyc., p. 270, the rule is well stated thus: "In general, the description of the land in a memorandum of a contract for sale of lands must be sufficiently definite to identify the land by its own terms, or by reference in it to external standards in existence at the time of the making of the contract and capable of being determined beyond dispute."

Do the letters, by their terms, refer to any external standard, in existence at the time they were written, from which the land can be certainly identified by parol testimony? The letters point out neither the state nor the county in which the four tracts of land are situated, the quantity of land in each tract, nor any description whatever of the tract to be conveyed, except that it is one of four tracts owned by the appellee, to be selected by the appellant. For all that appears in the letters, the four tracts may or may not be in the state of Mississippi, or even in the United States. Can it be said that (quot-

ing from the bill the contents of the lost letter) "one of his tracts of land, worth two thousand and five hundred dollars, stating that he had and owned only four tracts of land, either of which was worth that amount, and that he would take her to look over them, and she could take her choice of said places," is such a reference to an external standard, in existence at the time the letters were written, as that the land intended could be certainly identified by parol? It is true that the four tracts of land were in existence at the time; but this was insufficient to meet the requirements of the rule. The external fact (if it may be called a fact) referred to by the letters, from which alone the lands were to be identified, was the right of choice of one of the four tracts, to be thereafter exercised by the appellant. This was no external standard in existence at the time the letters were written. It was a matter about which she could have changed her mind every day, or oftener, until the final selection was made. As said in *McGuire v. Stevens*, 42 Miss. 724, 2 Am. Rep. 649: "Extrinsic evidence is admissible only to construe and apply the terms of the writing." How could the terms of these letters be construed and applied, so as to ascertain what land was intended, when, at the time they were written, no selection had been made by the appellant, and none was to be made until afterwards.

As to what land was selected by the appellant rests entirely in parol; in fact, the whole matter of the identification of the land rests in parol. In *Holmes v. Evans*, 48 Miss. 247, 12 Am. Rep. 372, the contract was to convey a "lot on the corner of Main and Pearl streets, city of Natchez, Adams county, Mississippi," which the court held to be within the statute of frauds, saying: "In the case under consideration, the memorandum or receipt refers to no extrinsic fact by which it could be ascertained on which corner of Main and Pearl streets the land in controversy is situated. And to allow parol evidence

to establish its locality would be in violation of the statute, in allowing that to pass by parol which the statute says shall not so pass, and would open the door to all the mischiefs intended to be provided against by the statute." The right of the appellant to make choice of the tract of land which appellee was to convey to her cannot be said to be an "extrinsic fact," to which resort may be had by parol. The right to choose is not an "extrinsic fact." It is a mere state of mind, and makes the identification of the land even more vague and uncertain than the letters themselves. The object of the statute of frauds was to prevent frauds and perjuries. The contract here clearly comes within the evils sought to be avoided by the statute. To illustrate: If this case were tried, the appellant's evidence might tend to prove that she had selected a certain tract of land; while that of appellee might tend to show that she had either made no selection at all, or had selected a different tract from the one claimed by her to have been selected.

The principle declared by this court in *Stevenson v. Renardet*, 83 Miss. 392, 35 South. 576, and other authorities, to the effect that prenuptial contracts are to be construed liberally in favor of the wife, may not be so extended, as is sought to be done here, as to overturn the statute of frauds. The provision of the statute of frauds, which declares void contracts for the sale of lands unless in writing, applies, whether such contracts are made in consideration of marriage or otherwise. In other words, a contract to convey land in consideration of marriage will be void under the statute of frauds, if it would be void were the consideration money or something else than marriage. The decisions of this court construing the provision of the statute of frauds requiring contracts for the sale of lands to be in writing apply with equal force to contracts to convey lands in consideration of marriage. There can be no possible reason for the application of any different principles. This

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court has consistently refused to ingraft any exceptions on the statute of frauds. Where parties place their contracts of marriage on a monetary basis, they have no right to complain that the courts apply to such contracts the same principles of law which govern other transactions based on like considerations. *Affirmed.*

CASES ARGUED AND DECIDED
IN THE
SUPREME COURT OF MISSISSIPPI
AT THE
MARCH TERM, 1911.

ALVIN LAKE v. J. C. PERRY.

[54 South, 945.]

TENANTS IN COMMON. *Compensation of co-tenant.*

Neither joint tenant or tenants in common are entitled to compensation from each other for services rendered in the care and management of the common property in the absence of a specific agreement or mutual understanding to that effect.

APPEAL from the chancery court of Grenada county.
HON. I. T. BLOUNT, Chancellor.

Suit by Alvin Lake against J. C. Perry. From a decree in favor of appellee, appellant appeals.

The facts are: Appellant filed a bill in chancery to set aside a voidable deed to appellee, made during appellant's minority, and praying an accounting. This case was appealed at a former term of the court from a decree dismissing the bill, and was reversed. 95 Miss. 550, 49

South. 569. Thereafter the chancellor entered a decree sustaining appellant's bill, setting aside the voidable deed, and ordering an accounting. The commissioner stated an account, referring back to the court the question of whether Perry, the appellee, was entitled to services for managing the partnership property. The court allowed the item as an offset against the claim for rent, and from this judgment comes this appeal.

Cowles Horton, for appellant.

The sole question presented by this record is whether the learned court below erred in allowing to appellee this offset for alleged personal services in "managing" this property during the years of his possession.

This question should be answered in the affirmative for two reasons: (a) Because there is nothing in the record upon which this allowance can be based. (b) Because, under the law, such an allowance is not sustained by the authorities.

In the next place, even did the facts of this case warrant this allowance, the law is against the appellee. The rule in such matters, as stated in a number of authorities, of which the following are some, is that appellee is held down to such taxes as have been paid by him, and such improvements as add to and enhance the vendible value of the property. These were allowed by the commissioner, and no objections are made to his report. See, in this connection generally, *Massey v. Womble*, 69 Miss. 347; *Hicks v. Blakeman*, 74 Miss. 459; *Hudson v. Strickland*, 58 Miss. 193; *Walker v. Williams*, 84 Miss. 392.

The rule in actions of ejectment, as established by the legislature, is likewise such as to exclude any such allowance as was made in this case. Sections 1848, 1849, Code 1906.

Having failed then to find any authority or precedent upon which the learned court below could have based its ruling, we presume the court will consider whether it be

right on principle. A review, then, of the entire case, as presented by the whole record—the one on the former appeal and the subsequent developments as presented by this record—will be helpful.

Appellant and others were cotenants of this property. All of the owners joined in a deed to appellee. Appellant, being a minor at the time, filed this bill to set aside his deed, which, as stated, was done. Thereupon this accounting was ordered, and appellant allowed to recover his rents, etc., against which appellee was allowed to offset taxes, etc., and this claim for alleged personal services. Appellee's possession of this property was at all times adverse to appellant; there is no agreement, express or implied, whereby appellee can seek to claim for these services, and unless he is entitled to them as a pure matter of law, then the learned court below is in error in making the allowance. Does the law, then, warrant this ruling?

In the case of *Shipp v. McKee*, 80 Miss. 746, the court gives us this rule, applicable here: "The effect of the disaffirmance by her (a minor) is to render the conveyance void *ab initio*, and to entitle her to charge the purchaser for rents during the whole time that he occupied the property, claiming under her deeds. But the defendant by the conveyance acquired the title of Mrs. Hubbard, who was a cotenant with her, and his liabilities and rights are therefore to be tested by the rules governing cotenants." Quoting from *French v. McAndrew*, 61 Miss. 192.

Tested by this rule, let us see whether this allowance is warranted by the law.

In 17 Amer. and Eng. Ency. Law (2d Ed.), page 688(6), under the heading: "Personal Services," we find this language: "Joint tenants or tenants in common are not entitled from each other for services rendered in the care and management of the common property in the ab-

sence of a special agreement or mutual understanding to that effect."

Says the supreme court of Florida, in *Fuller v. Fuller*, 2 So. 426: "Compensation for individual services in managing or taking care of the joint property is never awarded to a cotenant, except as a result of a direct agreement to that effect, or unless from all the circumstances of the case the court is satisfied of a mutual understanding between the parties that the services rendered by one should be paid for by the other. *Freem. Cotenancy*, § 260."

This language is quoted and approved by the same court in the later case of *Anderson v. Northrop*, 33 So. on p. 423; see also, *Henderson v. Chaires*, 17 So. 574; *Sharp v. Zeller*, 38 So. 449; *Hamilton v. Conine*, 92 Amer. Dec. 724; *Redfield v. Gleason*, 15 Am. St. Rep. 889.

We submit, therefore, that the learned court below is in error on this point; that a decree here should be entered for appellant allowing him the rents, etc., found by the commissioner, with the interest allowed by the court below, against which there should be offset the amount expended by the appellee for taxes and the improvements, as found by the commissioner—thereby disallowing this claim for alleged personal services.

S. A. Morrison, for appellee.

My friend, Horton, in his brief, is far from fair when he makes the statement that the commissioner, "then certified to the court two questions, upon which he heard no proofs and upon which he expressed no opinion." The proof in this point was exactly the same as on all others; the report of the commissioner, in this cause was an agreed one by and between appellant's counsel and myself. Every item in the same was based on statements made by Perry, over which appellant's counsel and I consulted, culled, reduced and agreed upon, except the two

questions certified up by the commissioner as questions of law and this form of this report was also agreed upon between us, no such objection is pressed by counsel, but the same is stated and quite unnecessarily. No claim was allowed Perry for any improvement, however permanent, which did not go directly and immediately to increasing the rent year by year as each year, taking into consideration the cropping year shows; indeed, Perry pressed no other items. It is hardly fair now to state that no proof was taken when everything was, and of necessity had to be based on Perry's statement. These items were taken from the books of Perry as he charged them at the time to this plantation, charging his services in each month against the whole (this twenty-acre claim of Lake is a part of a track of one hundred and sixty acres bought by Perry from the Lakes, because contiguous to a large farm owned by him), and this charge was the proportionate part this little strip, or one-eighth of the one hundred and sixty acres would bear to the whole and Lake got the benefit of one-eighth of the whole income, there being no other way by which Perry could come in any way close to what was due this erstwhile infant. Perry made an exact report, a true report, based on a certainty, since the charges were made at a time, even had Perry been inclined to cheat, when Perry knew nothing of the claim of appellant. Both court and counsel for appellant expressed surprise, that so much should have been realized on so small a parcel of land, during the time, which covered four bad crop years and one complete overflow; nor did counsel have the slightest, at that time, idea of appealing, but not being in communication with client made all due exceptions and appellee, thinking the whole matter settled, tendered the amount found due but counsel's client wished it pushed to a finish, which he has a complete right to demand.

The principle items allowed Perry are for building a fence to inclose a large pasture, which was rented to

neighbors and tenants and for draining a slough, which added about twelve acres to the cultivatable land; and while not more than one-half of this whole land is now under cultivation, Perry made no claim that more than the appellant's share remained open and uncultivated by him, but reported from his books, and absolutely correct account and this shows that after paying all expenses allowed him netted more than fifteen per cent during five out of nine years of the hardest cropping years we have had. Now the amount allowed Perry for his services is a few dollars more than the interest on the claim of the appellant, but Perry made no objections as the sum was not worth it. Had Perry not given his personal attention to this seven hundred and eighty-acre farm, he would have been compelled to employ an overseer, at a larger wage than he charged against the property for his own services, all the lands being worked by share croppers, it required the constant supervision of some one to see that full work was done.

I have gone fully into this part of the matter so that with the case of *Lake v. Perry* heretofore decided by this court, the court may see fully where the justice of the case is and do justice by all.

WHITFIELD, C.

In 17 Am. and Eng. Ency. Law (2d Ed.), p. 688, it is said: "Joint tenants or tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property, in the absence of a specific agreement or mutual understanding to that effect." In case of *Fuller v. Fuller*, 23 Fla. 236, 2 South. 426, the supreme court of Florida says: "Compensation for individual services in managing or taking care of the joint property is never awarded to a cotenant, except as the result of a direct agreement to that effect, or unless from all the circumstances of the case the court is satisfied of a mutual un-

derstanding between the parties that the services rendered by one should be paid for by the other. *Freem. Cotenancy*, section 260." There is nothing whatever in the testimony in this record showing either any express contract to pay Perry for his services as manager of the common property, or the existence of any circumstances from which the court could be satisfied of any implied understanding between the parties for such payment. The chancellor, therefore, erred in allowing the appellee for his services as manager of the common property.

The chancellor allowed interest at six per cent. per annum on the amounts of rent due appellant, in accordance with the general rule. It is sought to question this action of the chancellor here on special grounds, as the long delay, etc., on the part of Lake in demanding his interest. But that question is not presented for our determination in any manner by this record. The solitary question before us, and which we are confined by the record, is the allowance by the chancellor of compensation to Perry as manager of the common property.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated, the decree of the court below is reversed, and a final decree will be entered here for the appellant.

MRS. T. A. STEITENBOTH ET AL. v. CITY OF JACKSON.

[54 South. 955.]

1. MUNICIPAL CORPORATIONS. *Supplying water outside of corporate limits. Powers. Code 1906, municipal chapter.*

Municipalities have no powers, except such as are delegated to them by the state, either expressly or by necessary implication; and there is no distinction in this respect between governmental powers and those of a private or business nature.

2. SUPPLYING WATER TO PERSONS OUTSIDE CORPORATE LIMITS.

Under the municipal chapter, Code 1906, municipalities have no power to supply water to persons living outside of the municipality and it cannot be said that such power results by necessary implication from the power given the municipality to supply its own citizens with water.

APPEAL from the chancery court of Hinds county.

HON. G. G. LYELL, Chancellor.

Suit for damages by Mrs. T. A. Steitenroth et al. against the city of Jackson in the circuit court which was removed to chancery court by injunction. From a decree perpetually enjoining the suit, complainant appeals.

The facts are: Some years before the institution of this suit the waterworks system operated in the city of Jackson was owned by a private corporation, and during the time it was so owned certain parties ran a private pipe line a half mile or more beyond the city limits in order to secure water facilities. Later other parties tapped this private line in order to secure water. There after the city bought out the waterworks plant and operated it. There was one tap line, which served several parties, some of whom refused to pay their water rent. The manager of the city waterworks asked permission to come upon their premises and cut their water off at the hydrant, because of nonpayment of rent; but permission

was refused. Thereupon the city informed all the owners along the tap line that after the end of the quarter, if all arrears had not been adjusted the entire tap line would be cut off from service. Nothing was done toward adjusting the water rents, and at the date stated the entire tap line was cut off. Appellants, who had paid all their water rents prior to the beginning of the new quarter, were deprived of their water by reason of having the entire line cut out. After about two or three weeks the delinquents gave the city permission to come in and cut the water off at their hydrants. This was done, and water service continued to appellant and all others who had paid their dues. Appellants brought suit for damages in the circuit court. The case was removed to the chancery court by injunction, and the decree enjoining the suit was made perpetual. The contention of the city is that it was under no obligation to supply water to non-residents, and, if it did contract with them to do so, it had a right to terminate the contract at the end of any rental period.

Watkins & Watkins, for appellant.

The city of Jackson had the implied right to furnish water to the persons in the suburbs of the city, though outside of its corporate limits.

Section 3339 of the Code of 1906 gave appellee, the city of Jackson, the right to erect, purchase, maintain and operate waterworks, and to regulate the same. It will be noted that this is the express grant of power under which the city acted in acquiring the water plant of the light, heat and water company. It will further be noted that the powers of a municipality are of two kinds; those which are expressed and those which arise by implication, or natural inference. It is our position in this case that the city of Jackson having the express statutory right to acquire a waterworks system for the purpose of supplying water to its inhabitants, and it having exer-

cised this express grant by purchasing the waterworks system referred to, that in view of the fact that the waterworks system which it acquired was supplying through pipes already laid, either at the expense of private persons, or at the expense of the company persons living just outside of the corporate limit, that by natural inference and by necessary implication the municipality had the right to continue this service, and with a view of presenting this principle to the court, we will direct your attention to the authorities sustaining our view.

It will be noted in this connection that the power of the city to furnish water to its inhabitants is not a governmental power, that it is not exercising a power of sovereignty. It is most generally stated that in the exercise of matters of sovereignty or in the exercise of its governmental functions, such as the levying of taxes, the enforcement of its criminal ordinances, the exercise of its police power and similar governmental functions that a municipality has no extra territorial functions; but, we respectfully submit that there may arise, and often does arise, cases in which a municipality exercising not governmental, but purely a business function, is not limited by corporate limits. A municipality has other functions than that of a sovereignty. It exercises governmental functions, and, again, it has the right to exercise and carry on business, and in carrying on and operating its business functions it is subject to the same rules and regulations as a private individual or corporation would be, and is not confined within the boundaries of municipal limits.

This principle is illustrated in a decision of this court in the case of *Lester v. Jackson*, reported in 69 Miss., p. 887. The city of Jackson had no right by express grant to own a park for municipal purposes, either within the said limits or without. Mrs. Ellen Moore, the widow of Gov. Poindexter, devised to the city to be used for a public park certain property, then outside of the city

limits, and the question arose as to the right of the city to accept the devise, and the court held that by necessary implication the municipality had the right to accept the gift, upholding at the same time the distinction between the exercise by a municipality of its governmental powers and the powers which it exercises in common with other corporations. The court uses the following language: "It is true the city may not have the same power of police over the park without its limits that it would over one within them, but the laws of the state would be in full operation there, and the right of the town, as owner, would be protected by them as are the property rights of natural persons. The fallacy in the argument of counsel for appellant seems to us to rest in the assumption that a town may not own property, however necessary or convenient to its corporate purposes, unless it may exercise rights of sovereignty over it. All acts of municipality, by which parts of the sovereign power of the state delegated to it are exercised, must, of course, be performed within the territory over which the power is delegated; but a right to own property is not a sovereign right. One state may own land in another, but it can exercise no governmental control over it; for, as to such land, it stands in the position of a private person. So a city owning a park without its limits could exercise over it only those rights and powers which spring from ownership."

It will only be necessary in this case to observe the distinction between the sovereign power of a municipality and its pure business functions, and it will be found that those cases, for the most part, which limit a municipality to its own boundaries, refer primarily to the exercise of the power of sovereignty delegated to it by the state. This principle is well illustrated in the case of *Schneider v. City*, 99 Am. St. Rep. 996. The municipality had the express power under its charter to work and keep in repair its streets in order that the same should be safe

and convenient for passage. It sought to buy a stone quarry some seven miles from the city limits for the purpose of quarrying rock and stone for transportation to the city to be used in the repair of its streets. The exercise of this power on behalf of the city was contested, and it was said, just as is contended in this case, that a city cannot contract beyond its corporate limits; about which the court has the following to say:

“It would not be profitable to examine at length the numerous cases called to our attention. It seems sufficient to say that, in the main, they hold that municipal authority in a governmental sense cannot be exercised outside the limits of a municipality. That is in harmony with the decision of this court. It is also in harmony with the view that municipal ownership may reach beyond the corporate limits as held in the cases to which we are referred. When one draws the distinction between mere right to own property for city purposes and the right to exercise sovereign authority over property, the authorities upon which this case was grounded are easily seen not to warrant the result sought. In testing the question of whether a municipality has exceeded its corporate authority in going outside its boundaries in any given case, we must first determine the purpose in view. If that be found to be the exercise of police authority, or authority to govern in any sense, the conclusion must be that the end does not justify the act. If it be found to be mere exercise of a business function, the conclusion must be that the mere act of going beyond the boundary does not necessarily involve excess of power. In determining whether corporate authority has been exceeded by reason of distance from the city limits, we must solve that by an appeal to reason and common sense, keeping in mind that municipal corporations in their business matters are governed by very much the same rules as private corporations.”

Again, in the case of the *City of Coldwater v. Tucker*, 24 Am. Rep. 601, the question arose as to whether a municipality had implied authority to make contracts beyond the city limits for the construction of its sewerage system. The court held that unless explicitly prohibited from so doing that by natural inference it had the power, using the following language:

"By this contract the city undertook to do certain work outside of its own limits, where its power to secure the results bargained for depended on its power to make a private contract with outside land owners and not upon any statutory or chartered authority. The ditch itself was laid out under the supervision of the drain commissioners. If the contract was valid the city acted, so far as this work was concerned, in the same right as a private person contracting to do work on the land of another." The court held in that case that the municipality had the implied authority to go beyond the city limits in order to effect a proper drainage system. *Savings Bank v. Arkansas City*, 22 C. C. A.

It is held in the case of *Land v. Improvement Company v. City of Billings*, 50 C. C. A. 70, that a city has authority by implication in erecting a sewerage system to extend the same beyond the city limits. The same is held in the case of *Langley v. Augusta*, 118 Ga. 590. The same rule is announced in the case of *Wilson v. Boise City*, 6 Idaho 391.

It is held in the case of *East Syracuse*, 20 Abbott (N. C.), 131, that by necessary implication a municipality had the authority to work and keep in repair a highway leading beyond its limits to a gravel bed owned by the city. Cyc. 28, p. 262.

We refer the court to the following cases: *Mauldin v. Greenville*, 8 L. R. A. 291; *Heilbon v. Cuthbert*, 96 Ga. 312; *Ellenwood v. Reidsburg*, 91 Wis. 131, and in most of these cases it is held that a municipality, without express grant of power, not only has the right to furnish

Brief for appellant.

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lights for its streets and public places, but that without express authority and by inference, it has the right to furnish lights to its inhabitants. We refer especially to the case of *Crawfordville v. Braden*, 14 L. R. A. 272.

It is also held in the case of *Twitchell v. Spokane*, 24 L. R. A. (N. S.) 290, that a municipality having the right to furnish water to its inhabitants, has by implication the right to furnish the same free to charitable institutions.

The question is as to whether or not the power sought to be exercised is reasonable, proper and necessary. Would it be reasonably proper for a private corporation to do so? For a case directly in point, we refer the court to the *City of Henderson v. Young*, 83 S. W. 583, where the right of the city to furnish electric lights to the inhabitants of the suburbs of the city was contested. The supreme court of Kentucky in delivering the opinion used the following language:

“A city has two classes of powers, one legislative and one governmental, in the exercise of which it is a sovereignty and governs its people; and in the exercise of this class of powers the statute must be strictly construed. The other class of powers is conferred upon it for the purpose, not of government, but for private advantage to the city and its inhabitants. In these powers it is governed by the same rules that govern individuals or corporations. See *Dillon's Municipal Corporation*, 3d Ed., par. 36. In the management and operation of its electric plant a city is not exercising its governmental or legislative powers, but its business powers and may conduct the same in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters.”

The court will see that the rule requiring a strict construction of the grant of power of a municipality refers

only to the exercise of its sovereign powers and that an entirely different principle of construction is adopted in passing upon the exercise of its purely commercial functions.

Powell & Thompson, for appellee.

It is first contended on the part of the city that the city did not have power under its charter to make contracts to supply water to parties living beyond the city limits and secondly that if they had such power they were under no obligations to continue to supply water and had the right to terminate the understanding at the end of each quarter for which the parties had contracted with or without excuse, and thirdly that in order to protect itself, the city was bound as its only remedy to do what it did in the premises.

First. Then what were the powers of the city in the premises? The city of Jackson is under the municipal chapter of the Code of 1906 and referring to section 3314 of this Code, we find that the city has power to purchase and hold real estate and personal property; to purchase and hold real estate, within the corporate limits, for all proper municipal purposes, and for parks, cemeteries, hospitals, schoolhouses, houses of correction, waterworks, electric lights, and sewers. And without the corporate limits may be owned under purchase, grant, or devise, heretofore or hereafter made, to be used for such purposes, and for pest-houses.

Under section 3339 of the same Code the city is given the further power to erect, purchase, maintain, and operate waterworks, and to regulate the same; and to prescribe the rates at which water shall be supplied to the inhabitants; and to acquire by purchase, donation, or condemnation, in the name of the municipality suitable grounds, within or without the corporate limits, upon which to erect waterworks, and also the right of way to and from such works, and also the right of way for lay-

ing water pipes within the corporate limits, and from which waterworks to the municipality, and to extend such right from time to time; or to contract with any person for the erection and maintenance of waterworks for a term not exceeding twenty-five years, fixing water rates in the contract subject to municipal regulations. But a contract for the erection, purchase, or maintenance of waterworks shall not be entered into until submitted to a vote of the qualified electors, and approved by a majority of them.

These two sections embrace all of the powers that the city of Jackson had to make this contract and show that the present contract on the part of the city was *ultra vires*.

In the American and English Encyclopedia of Law, vol. 15, on page 1100, under the head of *Ultra Vires Contracts* we find the following: "The duties and powers of the officers and agents of a municipal corporation are prescribed by statute that every person dealing with them may know, and so charge with knowledge of the nature of these duties and extent of these laws."

It follows therefore that the agents, officers, and even the city council of a municipal corporation cannot bind it by an act which transcends their lawful or legitimate powers, and a municipal corporation may set up a plea of *ultra vires*, or its own want of power under its charter or constituent statute to enter into a given contract.

And find in volume 1 of Municipal Corporations by Abbott on page 555 the following: "A public corporation, it must be remembered, is first an artificial person and second an artificial person of such character that, as compared with others, its powers are still restricted and limited, and further the tendency of the courts is to confine the exercise of corporate powers strictly to such as are clearly given, and following this rule the power to contract, of a particular public corporation of whatever class, will be determined, not by the application of gen-

eral rules or principles of law, but by the specific right given to such corporation in some grant of legal authority. Public corporations have only such rights and powers as are specially granted them or absolutely necessary to carry into effect the rights and powers so granted."

It certainly cannot contend in this case that the extension of the water main beyond the city limits was necessary to carry on the system, certainly there is no proof at least to this fact.

In Abbott on Municipal Corporations in vol. 1, p. 577, the author says, "An unauthorized or illegal contract executed by a public corporation is incapable of enforcement. It is absolutely void and neither the doctrine of estoppel nor ratification can be invoked to maintain it."

This court in the case of Edwards House and Railroad Company against the city of Jackson, 51 So. Rep. 802, has announced the same doctrine.

If the city has the right to supply water consumers a mile beyond the city limits then it would have an equal right to supply water ten, twenty, or one hundred miles beyond the city limits, or in fact all over the entire state.

The powers granted to the city by name in the municipal Chapter as before stated are a limitation upon the powers of the city on the principle of *expressio unius exclusio alterius*.

SMITH, J., delivered the opinion of the court.

It is elementary law that municipalities have no powers, except such as are delegated to them by the state, either expressly or by necessary implication; and there is no distinction in this respect between governmental powers and those of a private or business nature. The powers of a municipality are granted to it, and must be exercised solely, for the benefit of the inhabitants thereof.

While, under the chapter on Municipalities in the Code, power is granted to do whatever is necessary in order

to supply the inhabitants of a municipality with water, nowhere in this chapter is power granted to supply persons living outside of the municipality with water, and it cannot be said that such a power results by necessary implication from the power given the municipality to supply its own citizens with water.

All of the cases cited by counsel for appellants in support of their contention are cases wherein the acts done by the municipalities and upheld by the courts were for the benefit of the inhabitants of the municipalities.

Affirmed.

ALBERT COOPWOOD, EXECUTOR, v. EMMA McCANDLESS.

[54 South. 1007.]

1. BREACH OF WARRANTY. *Remedy. Declaration. Essentials. Purchase of outstanding title. Liability of grantor.*

While in order to sustain the technical action of covenant for a breach of general warranty, there must be either an actual eviction by judicial process, or a surrender of possession to a valid, subsisting, paramount, legal title, asserted against the covenantee, or that there must be a holding of the grantee out of possession by such title, so that he could not enter, yet there are two other remedies that the covenantee may invoke without waiting for eviction or surrender of the premises. These other two actions are assumpsit, or suit in chancery.

2. DECLARATION. *Essentials. Code 1906, section 729.*

Under Code 1906, section 729, requiring a declaration to contain a statement of the facts constituting the cause of action in ordinary and concise language, a declaration is sufficient, if it states a good cause of action, no matter what may be its form or the name given it by the party filing it.

99 Miss.]

Brief for appellant.

3. COVENANTS OF WARRANTY. *Purchase of outstanding title. Liability of grantor.*

In every case where the covenantee purchases an outstanding paramount title, or pays an incumbrance, he assumes the risk of judging correctly as to the character and validity of the incumbrance or title which he buys. He must establish as a condition precedent to recovery, either at law or in equity, that it was a paramount lien or title against which the warrantor was bound to defend him; and that he acted under a necessity to save the estate.

APPEAL from the circuit court of Tunica county.

HON. SAM C. COOK, Judge.

Suit by Emma C. McCandless against Albert Coopwood, executor. From a judgment for plaintiff, defendant appeals.

The facts are as follows: This is an action in assumption to recover from the estate of appellant's testator, T. D. Coopwood, the sum of five hundred dollars expended by appellee in acquiring the paramount title of E. C. and Jeanette Coopwood to the land in controversy, which said T. D. Coopwood had in his lifetime conveyed to appellee with covenant of general warranty. The appellant filed a demurrer, which was overruled; and, appellant declining to plead further, judgment was entered for appellee, from which this appeal is prosecuted.

J. T. Lowe, for appellant.

From the record in this case, the very best that can be claimed for appellee, is that she, at the time she went out on her own initiative, and voluntarily purchased the alleged interest of Mrs. Jeanette Coopwood and Eugene Coopwood, that she was then, at that time, a tenant in common, and in undisputed possession and control of the said "Olive Place," the land in controversy. And we insist that this being the situation of affairs that she was not warranted in so voluntarily making said purchase, and then seeking to hold the appellee for a breach of warranty, and we insist that the rule as laid

down in the case of *Dyer v. Britton*, 53 Miss. 270, is the true rule to this day. Note the language of the court in said *Dyer v. Britton*: "The decisions in this state hold that in order to sustain an action on the covenant of general warranty there must be either an actual eviction by judicial process, or a surrender of possession to a valid, subsisting, paramount, legal title, asserted against the covenantee; or that there must be a holding of the grantee out of possession, by such title, so that he could not enter." Citing *Denis v. Heath*, 11 S. & M. 206; *Witty v. Hightower*, 12 S. & M. 478; *Burrow v. Wilkerson*, 31 Miss. 537.

And we insist that is the rule today in this case; see *Holloway v. Miller*, 84 Miss. 780, at bottom of page.

"And the duty of the vendee of the land, the title to which fails, as stated in *Dyre v. Britton*, 53 Miss. 278."

In this case there was no actual eviction by judicial process. There was no surrender of possession to a valid, subsisting, paramount, legal title, asserted against the covenantee, Mrs. McCandless. And there was no holding of Mrs. McCandless out of possession, so that she could not enter. And the courts hold that one of these three conditions must have prevailed.

But, the appellee may insist that he did not seek to recover on covenant, but brought his action in assumpsit.

Note the language of the court, in *Dyer v. Britton*, *supra*, 53 Miss. 279: "It must be noted, however, that the covenantee assumes the risk of judging correctly, as to the character and validity of the encumbrance or title which he buys in. He must establish as a condition precedent to recovery, either at law or in equity that it was a paramount lien or title against which the warrantor was bound to defend him, and that he acted under a necessity to save the estate. It will be perceived therefore that while we denied to the covenantee in a technical action on the warranty unless he can show an actual eviction, or surrender to a paramount title, etc., yet the principle

of law, for which the defendant in error contends, is as vital here as in those states which allow suit on the covenant. But it must be evoked, either in the action of assumpsit, or by suit in chancery. In the present case, the cause of action being substantially the same, whether in covenant or assumpsit, on the return of the case to the circuit court, the pleadings might be formed," etc.

So there can be no dispute as to the rule laid down in the case of *Dyer v. Britton*, applying the same, whether the proceedings against a warrantor, be by assumpsit, or on covenant.

Smith & Totten, for appellee.

Under the conditions in this case, there were left open to the appellee two courses, to-wit:

(1) To have suffered an actual eviction by judicial process, or surrendered possession to the legal, paramount title asserted against her by the said Eugene C. Coopwood and Jeannette Coopwood, and brought her action on the covenant of general warranty, or

(2) Buy in the paramount title which she knew would ultimately prevail, as was done in this case, and bring her action in assumpsit or chancery court to recover back the money to reimburse her, as is now done in this case.

As will be seen from the declaration as well as from the admission of appellant's counsel in his statement of facts, this is an action in assumpsit, and not a technical action on covenant of warranty. We admit that to sustain an action on the covenant of warranty the rule cited by counsel for appellant as laid down in the case of *Dyer v. Britton*, 53 Miss. 270, is correct, but it has no application here, for it is admitted as shown by the declaration that this is not an action on covenant, but an action in assumpsit. Counsel for appellant seems to misconceive the theory of appellee's contention in this: That this is an action in assumpsit to recover outlays of money

to preserve the estate conveyed to her by appellant's testator, and is in no sense an effort on her part to recover on the warranty, except in so far as the breach of the warranty is necessary to entitle her to make out her case in assumpsit pure and simple. By section 729 of the Code forms of action are abolished, and all that is necessary now is "the declaration shall contain a statement of the facts constituting the cause of action in ordinary and concise language, without repetition; and if it contains sufficient matter of substance for the court to proceed upon the merits of the cause, it shall be sufficient; and it shall not be an objection to maintain any action that the form thereof should have been different. *Evans v. Miller*, 58 Miss. 120.

The case of *Dyer v. Britton*, 53 Miss. 270, was an action of covenant brought on the covenant of general warranty to recover from the vendor's administrator, Dyer, the certain money which Britton had paid to prevent his land from being sold under a mortgage given upon the land by Keith prior to his sale to Baker, who sold Britton with this unsatisfied mortgage upon it. Britton paid the amount of money required to prevent the sale, and eviction, and brought his technical action on the covenants of general warranty to recover back the money he had been compelled to pay, and the court very properly announced the rule stated above and by counsel for appellant. But it will be noted that just after announcing that principle the court uses this language: Quite thirty years have elapsed since the first of these decisions. We are asked now to overrule them, because the doctrine they announce is not in harmony with the current of American law, and is not supported by sound suggestions. If the question were *res integra*, we should adopt the reasoning and conclusion of that line of decisions, which have admitted constructive or equitable eviction as of a general import with an actual ouster in certain circumstances. If we did not have in our juris-

prudence a principle which was equitable and just, we would not hesitate to overturn these decisions if they were the obstruction. But we have in the remedial machinery of our jurisprudence full, practical, and adequate remedy and redress for the covenantee to reimburse him for the outlay in extinguishing such incumbrances or getting in the adverse paramount title. He may recover back in the action of assumpsit, as in *Kirkpatrick v. Miller et al.*, 50 Miss. 521, or he may sue in chancery. The action of assumpsit may be resorted to in every instance where money has been necessarily expended to discharge the estate from incumbrances, or get in a title to avoid an eviction. So that we afford to the covenantee a cheap and simple remedy at law, which administers as complete and full indemnity as the class of cases elsewhere, which recognizes breaches of the covenant as constructive and technical eviction." It is also decided in that case that in addition to the remedy by assumpsit the vendee may bring his plaint in the court of chancery. What would be the use of requiring appellee to be put to the expense of a fruitless litigation against an incumbrance or paramount title, which must ultimately prevail? The court in the case of *Dyer v. Britton* holds that he may, if necessary to preserve the estate and possession, pay off the one and buy in the other, for such outlays of money he shall be reimbursed.

In the case of *Kirkpatrick v. Miller*, 50 Miss., cited in the case of *Dyer v. Britton*, the court in deciding a similar case to this says: The proposition contained in the plaintiff's declaration is that a court of law shall do what has long since been a favorite relief in equity. Assumpsit is a special action applicable to those circumstances where the defendant ought in equity and good conscience to pay money but which is not recoverable in debt or covenant. If there be not an expressed promise then the defendant is under duty to pay, the law implies the promise. We submit that in equity and good con-

science the money here paid out by appellee was to preserve the estate and possession against a paramount title, and that appellant's testator's estate is under a duty to pay back to appellee the sum of five hundred dollars thus expended, and this being an action of assumpsit, the remedy pointed out by the court in the above cases, the action of the court below in overruling the demurrer was correct.

We desire to call the court's attention also to the case of *Holloway v. Miller*, 84 Miss., bottom of page 708, again reaffirming the doctrine contained in the *Dyer v. Britton* case.

MAYES, C. J., delivered the opinion of the court.

In this case it is apparent that Mrs. McCandless bought a tract of land from T. D. Coopwood and paid him one thousand dollars for same. He made to her a fee-simple deed to the property, with a covenant of general warranty. At his death the title failed as to one-half of the property, and Mrs. McCandless was compelled to pay five hundred dollars, or one-half of the amount she originally paid for the property, in order to buy in an outstanding paramount title then threatened to be asserted against her. The demurrer admits all these facts.

The sole contention of appellant is that this is a suit for breach of the covenant of general warranty, and in order that this suit may be sustained it is contended that there must be either an actual eviction by judicial process, or a surrender of possession to a valid, subsisting, paramount legal title, asserted against the covenantee, or that there must be a holding of the grantee out of possession by such title, so that he could not enter. In support of this contention appellant cites the case of *Dyer v. Britton*, 53 Miss. 270. The authority cited is destructive of the contention. It is true that the authority does hold with the contention of appellant, when it is

manifest that the covenantee desires to ground his case on the technical action on the covenant of general warranty; but this case also shows that there are two other remedies that the covenantee may invoke without waiting for eviction or surrender of the premises. These other two actions which may be invoked are *assumpsit* or *suit in chancery*.

All that is required of a declaration is that it contain a statement of the facts constituting the cause of action in ordinary and concise language. If a declaration does this, under the practice now in effect in this state, no objection can be successfully urged on the ground that the form should have been different. This is declared by section 729 of the Code of 1906, and was the law in all Codes preceding the Code of 1906 from the Code of 1880. The abolition of all form does not seem to have been in the Code of 1871, the Code that was in effect at the date of the decision in the case of *Dyer v. Britton*, *supra*. This court now looks to the merits of the case as stated by the declaration, rather than the form in which it is stated. If a declaration states a good cause of action, no matter what may be its form, or the name given it by the party filing it, this court will ignore all but the fact of whether or not it states a cause of action. See *Evans v. Miller*, 58 Miss. 120, 38 Am. Rep. 313; *Trust Co. v. Hardwood Co.*, 74 Miss. 584-594, 21 South. 396.

Looking to the declaration in this case, and the admitted facts under it, it is manifest that Mrs. McCandless is entitled to recover back this five hundred dollars from the estate of T. D. Coopwood. It is quite true that the declaration concludes with the statement that "plaintiff brings this suit and demands judgment against defendant for the sum of five hundred dollars, the amount she is damaged by the breach of said covenant of warranty," thus indicating that it was filed as a technical action on the covenant of general warranty; but this court looks

to its substance, and not to its form. In the case of *Dyer v. Britton*, 53 Miss. 270, the court clearly indicated that, but for the fact that a plaintiff could resort to two other remedies in order to recover back money necessarily expended in discharging the estate from incumbrances or to get in a title to avoid eviction, the rule of law contended for by appellant would have been changed as far back as 1876, and before the passage of a statute abolishing all forms of action. The court said, in the case of *Dyer v. Britton*, *supra*, that the question had no significance other than that of mere pleading; that it was of no practical importance, since a covenantee had two other remedies, avoiding the technical and unnecessary rule of law applicable when the suit was on the covenant of general warranty. But to quote the exact language of the court, found on page 278 of 53 Miss., in *Dyer v. Britton*, it is as follows: "If we did not have in our jurisprudence a principle which is equitable and just, we should not hesitate to overturn these decisions; if they were the obstruction. But we have in the remedial machinery of our jurisprudence full, practical, and adequate remedy and redress for the covenantee, to reimburse him for the outlays in extinguishing such incumbrances, or in getting in the adverse paramount title. He may recover the money back in the action of assumpsit, as in *Kirkpatrick v. Miller*, 50 Miss. 521, or he may sue in chancery. The action of assumpsit may be resorted to in every instance where money has been necessarily expended to discharge the estate from incumbrances, or to get in a title to avoid an eviction. In no state of case in this action is the covenantor liable to refund more than was actually paid by the covenantee, and never in excess of his liability on the covenant, where an actual eviction could be assigned as a breach; so that we afford to the covenantee a cheap and simple remedy at law, which administers as complete and full indemnity as that class of cases elsewhere, which

recognize breaches of the covenant as constructive and technical evictions."

Of course, in every case where the covenantee purchases an outstanding paramount title, or pays an incumbrance, as stated in the case of *Dyer v. Britton*, he "assumes the risk of judging correctly as to the character and validity of the incumbrance or title which he buys in. He must establish, as a condition precedent to recovery, either at law or in equity, that it was a paramount lien or title against which the warrantor was bound to defend him, and that he acted under a necessity to save the estate." See, also, *Kirkpatrick v. Miller*, 50 Miss. 521; *Green v. Irving*, 54 Miss. 455, 28 Am. Rep. 360.

Affirmed.

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

OCTOBER TERM, 1910.

LEE WILTCHER v. STATE.

[54 South. 766.]

1. CRIMINAL LAW. *Homicide. Dying declarations. Admissibility. Conduct of judge. Coercion of jury.*

The jury, when it retires to consider its verdict, should be left absolutely free from any and all outside influences so that it may consider the case submitted to them with perfect freedom.

2. SAME.

Where the jury retired to consider of their verdict between seven thirty and eight o'clock Friday evening and on the following Saturday evening sent a note to the judge, through the bailiff, "asking permission to take a walk on Sunday morning and evening," and saying that they were hopelessly hung, and the judge sent them word by the bailiff that "he would receive a verdict, if it was brought in by nine o'clock, but if not, he was going to Hazlehurst and would not be back until Monday morning," and that he would not receive a verdict on Sunday, and further gave the jury permis-

sion to take a walk on Sunday morning and evening; and the jury reached a verdict about nine o'clock Saturday night. *Held*, that the message of the judge was not an improper communication to the jury and had no tendency to coerce them into a verdict.

3. DYING DECLARATION. *Admissibility. Homicide.*

Where the dying man when told a few minutes after he had been shot that a doctor had been sent for said, "the doctor can't do me any good, I won't be here long," and then made a statement as to how he was killed, which was in substance the same as the statement he made to another witness some twelve hours later; and the testimony showed that the dying man grew weaker and weaker until he died and never at any time expressed any hope of recovery. *Held*, that the admission in evidence of the last declaration was not error.

4. HOMICIDE. *Admission of evidence. Harmless error.*

In a murder case, the admission of evidence that decedent's wife, shown to have been a conspirator with accused, had told witness, at a time before the conspiracy was formed, that she, the wife, was going to have her husband killed, and testimony of a witness that, while she and another, conspirator with accused, were going to decedent's house the night that he was killed, such conspirator stated to witness, some ten or fifteen minutes before the fatal shot was fired, and when the conspirator was not more than ten or twenty yards from the spot where decedent was killed, that he, the conspirator, was going to kill decedent, and that, if he did not, accused and another would kill such conspirator that night or early the next morning, though erroneous, was harmless error, where the indictment charging accused with murder was legally returned, and he was tried by an impartial jury, and the evidence established his guilt, inasmuch as the improper evidence did not deprive accused of a substantial right, and could not possibly have changed the verdict.

APPEAL from the circuit court of Yazoo county.

HON. D. M. MILLER, Judge.

Lee Wiltcher was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

Barbour & Henry, for appellant.

It was manifest error, and highly prejudicial to appellant to permit the witness, Bettie Price, to testify over

objection that one month before the murder of deceased, that Mrs. Wiltcher told her that she was going to have her husband killed, and failing in this, she would kill him herself. The court will notice from the transcript that objection was repeatedly made to this testimony because it appeared from the witness' own statement that it was three weeks or a month before the murder. The only evidence connecting appellant with any conspiracy, and in fact the only reference to that effect, was the testimony of Will Price, who said that the only times Lee Wiltcher ever offered to have his brother killed was on Saturday preceding the Saturday night of the murder (one week exactly) and on Friday, the day preceding the homicide, and of Tom Brokeman, that appellant talked to him on Wednesday before the killing, yet the court permitted this witness to detail conversations she had with Mrs. Wiltcher, weeks before there is any claim even, by the state, that appellant was her co-conspirator. The effect was to get to the jury conversations, showing Mrs. Wiltcher's purpose and desire and reason to have her husband killed, out of the hearing of appellant, and without his knowledge. The prosecuting attorney realizing the incompetence of the declaration, stated to the court that he would show that the old lady was off on the dates," a promise he did not even offer to keep. The court, realizing that the evidence was improper, as the record then stood, said: "The court will consider the matter and rule later." Immediately, the record shows, the jury was brought back, and all this incompetent testimony given before them, the court finally being generous enough to give appellant the benefit of an exception. We can conceive of no testimony, in a case like this, that could be more damaging.

That this testimony was incompetent under all the authorities is too plain. "Acts and declarations done and made before the formation of the conspiracy are not admissible against the co-conspirator unless brought

home to them, or made in their presence." Ency. of Evidence, vol. 3, p. 430; 34 N. W. 720; 9 So. Rep. 847; 34 Am. Rep. 746; 61 S. W. 735; 54 S. W. 211; 94 Ill. 299; 12 N. E. 865.

In order to make evidence admissible on the theory that there was a conspiracy between the defendant and others jointly indicted, it is necessary that it should be shown that the conspiracy was pending at the time of the statement, if made out of the presence of the co-conspirator. *Langford v. State*, 30 So. Rep. 503.

The identical question is decided, and held to be reversible error in the case of *Gillum v. State*, 62 Miss. 548.

During the examination of Rosa Moore, or Rosa Price, the court, over the objection of the defendant's attorneys, permitted her to testify as follows:

"Q. What did he say, if anything, about what he was going up there for? (meaning Will Price).

"A. He told me to go up there with him, that he wanted to borrow some money from Mr. John Wiltcher, and after we got nearly to the house, he said, 'I am going to kill Mr. Wiltcher,' and I begged him not to and said, 'I would not do it,' and he said, 'If I don't kill him, cousin Rosa, Mr. Lee and Miss Lula are going to kill me to-night or early in the morning.' He goes on and I steps in the shop and sticks my fingers in my ears to keep from hearing it."

This conversation between the witness and Will Price, as shown by her testimony, occurred ten or fifteen minutes before the shooting.

As stated in the argument of the facts in this brief, this is the only corroboration, or the only effort at corroboration, of the witness Will Price to the effect that Lee Wiltcher was present on the night of the homicide. The damaging effect of this testimony is manifest. The average juror, strange to say, regards a statement, whether self serving or not, out of court, corroborative of the testimony of the witness upon the stand, as strong

testimony. The court permitted this testimony on the theory that it was competent as the act or declaration of a co-conspirator, the alleged conspiracy having been shown by the testimony of Will Price. My view of this testimony is that it is not the declaration of a co-conspirator "in furtherance of and in execution of the unlawful design." Unless it was such declaration, it was clearly incompetent because made in the absence of the appellant, and in no way ratified or approved by him.

Our court, in this case of *Gillum v. The State*, 62 Miss. 547, uses the following language: "After a conspiracy has been established by evidence *aliunde*, the declaration and acts of each conspirator in the furtherance of the common design are admissible against all, but it is necessary that such acts and declarations be shown to have been made or done in the prosecution of the common purpose. They are admissible as parts of the *res gestae*, and declarations or admissions which are not themselves acts, and do not illustrate or interpret contemporaneous acts, do not partake of the nature of the *res gestae*, and are inadmissible against any others save those by whom they are made. 1 Philips on Evidence, 698. The threats and declarations of Thomas and Harry Gillum, which were proved against the defendant, were none of them made while the parties were engaged in any attempt to kill or injure the deceased."

It could not seriously be considered that this consideration by Will Price of his reason for the assassination, in any way illustrated or interpreted any contemporaneous act connected with the execution of the conspiracy. Of course, if at the same time he was upon the scene and John Wiltcher was being called out of his house, he had made any statement, this, of course, would have been part of the *res gestae* of the crime contemporaneous with its execution, and illustrative of his act in killing the deceased. But for him to state fifteen minutes before anything is done in execution of the alleged unlawful

design, in a confession, was no more competent than if he had confessed it two days before, because it did not illustrate or interpret any contemporaneous act in furtherance of any in execution of the unlawful design.

In the case of *Metcalf v. Conner*, 12 Am. Dec. 340, this very question is discussed, the court there saying:

"Any declarations by one of the party at the time of the committing the unlawful act, are no doubt not only evidence against himself, but as being a part of the *res gestae* and tending to determine the quality of the act, are also evidence against the rest of the party, who are equally as responsible as if they had themselves done the act. But what one of the party may have been heard to say at any other time as to the share which others had in the transaction, or as to the object of the conspiracy, cannot be admitted as evidence to affect them, for it has been solemnly decided that a confession is evidence only against the person himself who makes the confession, and not against others."

In the case of the *State v. Tice*, 48 Pac. Rep. 367, the court admitted proof of what one of the alleged conspirators not on trial narrated to the witness concerning what the witness designated he "supposed was the history of this instrument" (it being the trial for the forging of a will). The court held that it was reversible error, and said, "It was a subsequent narration of the transaction, and could not be considered as a part of the *res gestae* or as declarations concurrent in time with the commission of the unlawful act." Citing with approval the case of *Metcalf v. Conner*. The court held that this was error.

"On the separate trial of one charged with aiding another in a murder, the acts done by that other and conversations had with him in the absence of defendant are incompetent as evidence of the defendant's guilt." This was a trial upon the charge of murder where the appellant and his uncle were charged to have entered into a conspiracy to cause the death of a party. Certain state-

ments of the co-conspirator not on trial in the absence of the defendant, and which were merely narrative of the purpose or intention of the co-conspirator relative to the death of the deceased, were admitted in evidence. The court discussed the question here involved and reversed this case because of the admission of this evidence, holding that it was not in furtherance of or in execution of the unlawful design at the time the incriminating statements were made, but were in the nature of confessions or narrations. *Osmun v. Winters*, 46 Pac. Rep. 780; *Sheppard v. Yocum*, 10 Ore. 417; see, also, *State v. Fredericks*, 85 Mo. 145; *State v. Duncan*, 64 Miss. 263.

Philips on Evidence, vol. 1, par. 205, lays down a rule as follows: "Where several persons are proved to combine together for any illegal purpose, any act done by one of the party in pursuance of the original concerted plan and with reference to the common object is in contemplation of the law, the act of the whole party. It follows therefore that any writings or verbal expressions, being acts themselves or illustrating and explaining other acts, and so being part of the *res gestae*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appears that they were used in furtherance of the common design." And the author afterwards, at page 208 of the same volume, adds: "But where words or writings are not acts in themselves, nor part of the *res gestae*, but a mere relator's narration of some part of the transaction, or as to the share which other persons have had in the execution of the common design, the evidence is not within the principle above mentioned. It altogether depends upon the credit of the narrator who was not before the court, and it could not therefore be received."

The case of *Sample v. The People*, 13 N. E. 536, decided by the supreme court of Illinois in 1887, is directly in point on the proposition here involved.

The action of the court in admitting the alleged dying declaration of John Wiltcher, through the testimony of Dr. Frissell, was so manifestly incompetent and so clearly improper, that we hardly know how to argue the proposition. This court has held so many times that a dying declaration is not competent unless there is clearly made preliminary proof that when the declarant made it, he made it with the solemn belief in his mind that he was going to die, and that this condition of his mind takes the place of the solemnity of an oath. Of course this state of mind by the declarant can only be shown by his conduct, by his expressions of belief of impending death, or by suggestion to him by others that he was going to die, and the belief by him, as evidenced by word or deed, of his belief of that fact.

The position of this court upon the question of the competency of the dying declaration is stated in the following decisions: *Owens v. State*, 59 Miss. 547; *Ellis v. State*, 65 Miss. 48; *Helm v. State*, 67 Miss. 562; *Simmons v. State*, 61 Miss. 243; *Bell v. State*, 72 Miss. 510; *Lipscomb v. State*, 75 Miss. 559.

The fourteenth assignment of error we regard as the crowning injustice done this appellant on his trial for his life, and that too directly at the hands of the trial judge, who should have held evenly balanced the scales of justice and left the jury free and untrammelled in its deliberation.

Testimony taken upon the motion for a new trial shows that the jury in this case retired about seven thirty o'clock on Friday evening, and that the jury stood, after a number of hours of deliberation, four for acquittal and eight for conviction; that the jury had sent a note to the trial judge, sometime on Saturday evening late, in which they stated to the trial judge that they were hopelessly hung and could not agree upon a verdict. This note was given to the judge by one of the sworn bailiffs, Mr. Ferguson. Upon receipts of this note an astonishing and

shocking thing occurred, as shown by the following question and answer:

"A. What statement did Judge Miller send back to the jury room?"

"A. He said if they reached a verdict before nine o'clock, he would receive it. He said he would not receive a verdict on Sunday. He said he would receive a verdict, if it was brought in by nine o'clock, but if not, he would go on to Hazlehurst and would not be back till Monday morning."

From this it appears that a jury well divided and hopelessly hung on the question of the guilt or innocence of a man being tried for his life, who appealed to the trial judge to discharge them or permit them to take exercise on the next day, being Sunday, instead of discharging this jury, the trial judge sent "back to the jury room" the declaration that if they reached a verdict by nine o'clock that night, he would receive it, otherwise, he would keep them there until the next week, Monday. The transcript shows that promptly, or practically, at nine o'clock, this jury which had reported that it was hopelessly hung, four of them being for acquittal, find a verdict, and that a compromise verdict upon life imprisonment.

Can it possibly be said that this young man, under such circumstances as these received a fair trial? The state does not attempt to clear up the question of whether or not the jury returned the verdict because of the message sent by the trial judge, but elects to leave the record undisputed that the jury, at the hour fixed by the trial judge, brought in its verdict as a result of this coercion. This court has held that where such influence as this is brought to bear upon the jury, that it is presumed that the defendant was prejudiced and that this influenced improperly the jury.

This court in the very late case of *Shaw v. The State*, 79 Miss. 577, in a case not so strong as the one at bar,

speaking through Justice Calhoun in strong terms condemned an incident something like the one presented here, and reversed the case.

Concluding, we submit to the court that the transcript in this case shows that this appellant went before the jury burdened with the serious charge of murder, and positively staggering under the load of the accusation that he had assassinated his own brother in order that he might marry that brother's wife, so that any serious error of law must of necessity be regarded as reversible. The facts, when sifted, and the incompetent evidence eliminated, show that the question of the guilt of this appellant is a close one, particularly when the court will recall the perjury that the defense has exposed in the trial of this case, coupled with the feeling against this appellant as shown by the necessity of a change of venue, and the evidence in the transcript shows that an armed mob of thirty on Sunday morning visited the very witnesses who have appeared against this appellant in his trial. Regardless of this, however, even if his guilt is believed to exist by this court, and to appear from the evidence, it cannot be questioned, but that he has been denied rights guaranteed to him by the laws of this state, and injustices have been done him in his trial which have clearly operated against him.

If the common enemy of man was on trial under our laws for his action in regard to

“The fruit

Of that forbidden tree, whose mortal taste

Brought death into the world, and all our woe,

With loss of Eden,”

he should be tried by the rules and customs of our courts. He should not be made the victim of unfairness, and coercion.

Carl Fox, assistant attorney-general, for appellee.

It is said that it was manifest error, highly prejudicial to the defendant, to permit the witness, Betty Price, to

testify, over the objection of appellant, that a month before the murder of deceased Mrs. Wiltcher told her that she was going to have her husband killed, and failing in this would kill him herself. It is unfortunate that this evidence was admitted without first determining the time when this statement was made by Mrs. Wiltcher to the witness Betty Price. The record does not show, I think, as is stated by counsel for appellant, that this statement was made by Mrs. Wiltcher to the witness, Betty Price. The record does not show, I think, as is stated by counsel for appellant, that this statement was made one month before the murder.

So far as the time when the statement was made is concerned, I have no comment to make, but simply state the facts as shown by the record, as correctly as I can, for the information of the court.

It is true, as is stated by counsel for appellant, that the statement made by one conspirator before the conspiracy is formed, should not bind his co-conspirators, and this rule has a sound basis. It seems to me, however, that this testimony of Mrs. Wiltcher's statement to the witness might very well be held competent as showing the state of Mrs. Wiltcher's mind, as one of the circumstances tending to show that a conspiracy was formed. The theory of the state was that by reason of his criminal intimacy with deceased's wife, Mrs. Lulu Wiltcher, defendant had a motive for the murder of the deceased; and, further, the theory was that by reason of that same criminal intimacy, Mrs. Lulu Wiltcher had a motive for the murder of her husband; and, further, that both having the same motive, and the same desire that John Wiltcher should be put out of the way, they conspired together to have him killed. A conspiracy between the defendant and Mrs. Lulu Wiltcher could not be formed without a motive and desire on the part of Mrs. Lulu Wiltcher to have her husband put to death. In the condition of her mind, then, any motive which she

might have had to murder her husband was certainly, so far as the logic of the matter is concerned, competent to be proven as one of the circumstances tending to establish the conspiracy. And, since she and the defendant had the same motive to murder her husband, and the same desire for his death, according to the theory of the state, it is more probable that if she entered into a conspiracy at all to murder her husband, it would be with the defendant rather than with some one else having no such motive. The statement, if made before the conspiracy was formed, was inadmissible as proof of a circumstance tending to prove that the conspiracy resulted in the death of her husband, but evidence may be competent for one purpose and incompetent for another. It is admissible, if it is competent for any purpose. Would not proof of the declaration by Mrs. Wiltcher be admissible as a circumstance tending to establish the conspiracy? *Blain v. State*, 33 Tex. Crim. 236, 26 S. W. 63; *United States v. Logan*, 45 Fed. 872.

The distinction is between a statement made by one of the conspirators before the conspiracy is formed, offered to prove the commission of the crime as a result of a conspiracy; and offered as a circumstance tending to prove the conspiracy itself, and not a crime growing out of the conspiracy.

It is argued by counsel for appellant that it was error to permit Rosa Price, or Rosa Moore, to testify, over objection, that when she and Will Price were going to John Wiltcher's house the night he was killed, Will Price said to her when they arrived at the shop: "I am going to kill Mr. Wiltcher," and "If I do not kill him, Cousin Rosa, Mr. Lee and Miss Lulu are going to kill me to-night or early in the morning." Counsel say: "This conversation between the witness and Will Price, as shown by her testimony, occurred ten or fifteen minutes before the shooting." The shop where she stopped was fifteen or twenty yards from the front gate at John

Wiltcher's house, and she did say that the statement of Will Price, to which she testified, was made about ten or fifteen minutes before the gun fired.

Counsel for appellant say that this declaration was incompetent because it was not made "in furtherance of an execution of an unlawful design." They argue, further, that it was no part of the *res gestae* of the conspiracy. *Res gestae* is such a vague and indefinite term and signifies such a variety of unrelated doctrines, that I do not think we can obtain any enlightenment by considering it in that view. 3 Wigmore on Evidence, secs. 1795, 1796, 1797.

It is argued that it was error to admit the dying declaration John Wiltcher made to Dr. Frisell. This statement was made after the declaration made to Will Henderson. Henderson arrived at John Wiltcher's house and saw him about ten minutes after he heard the gun fire, and Dr. Frisell did not get there until three o'clock A. M., and left about nine A. M. The dying man stated to Henderson after Henderson told him that he had telephoned for Dr. Frisell: "The doctor can't do me any good; I won't be here long," and then made a statement to Henderson as to how he was killed. He did not die until about eleven o'clock the next day. If he knew when Henderson got there that he was dying, then it certainly is not likely that he had any reason to believe otherwise when he made the statement to Dr. Frisell.

The last assignment of error argued by counsel for appellant is the action of the court in sending a message to the jury, after they had retired to consider of their verdict, that if they reached a verdict by nine o'clock that night he would receive it, but otherwise he would not, but go to Hazlehurst and would not be back until Monday morning. The burden of proof upon this allegation made upon the motion for a new trial was upon defendant below. The only proof taken to sustain the

motion was the testimony of Mr. Ferguson, who was one of the bailiffs in charge of the jury. Omitting the preliminary questions and answers, his testimony was that the jury brought in a verdict "in the neighborhood of nine o'clock Saturday night," and that he reported it to Col. Harding, but that Judge Miller had gone home to Hazlehurst.

I think all the Mississippi authorities upon this question were cited in the briefs filed in the case of *Tolly May v. State*, which case was argued on the 2nd or 3rd instant. See *Alexander v. State*, 22 So. (Miss.) 871; *Polk v. Jacobs*, 26 Miss, 121-134; *Vicksburg Bank v. Moss*, 64 Miss. 644.

In *Show v. State*, 79 Miss. 577, the court gave as a reason for holding that such an error was fatal, "there is no evidence that the misconduct of the sheriff worked no injury." It appears from the record in the case at bar that before the judge sent the message to the jury they were in exactly the same frame of mind, with precisely the same thought they would remain locked up until Monday, which it was claimed it was error for the judge to induce by the message.

Argued orally by *J. F. Barbour* for appellant and *Carl Fox*, assistant attorney-general, for appellee.

McLAIN, C.

Appellant, Lee Wiltcher, along with Lulu Wiltcher and Will Price, was indicted in the circuit court of Yazoo county for the murder of one John Wiltcher. Will Price pleaded guilty to the charge, and was sentenced to the penitentiary for life. Lee Wiltcher and Lulu Wiltcher secured a change of venue from Yazoo county to the First district of Hinds county, and at the March term, 1910, of said court, a severance was granted, and Lee Wiltcher was tried, convicted, and sentenced to the penitentiary for life, and from that judgment he appeals to this court.

At the outset we will say that, so far as the facts in this case are concerned, the jury was fully warranted in finding defendant guilty as charged. Therefore we will not go into the details of the testimony, except to say that John Wiltcher, the deceased, was about forty-five years of age, and was the husband of Lulu Wiltcher, who was about thirty-five years of age, and that Lee Wiltcher was a brother to John Wiltcher, being about twenty-one years old. All three parties were white people. The theory of the state was that Lee Wiltcher and Mrs. Wiltcher were on terms of undue intimacy. They desired to get John Wiltcher out of the way. They conspired together to have him killed, and did hire Will Price, a negro, to do the actual shooting, though the evidence shows that both Lee Wiltcher and Mrs. Wiltcher were present, aiding and abetting, at the time John Wiltcher was shot down.

The counsel for appellant assigns as gross error the action of the court in sending a certain message to the jury, after they had retired to consider of their verdict. He characterizes it "as the crowning injustice done this appellant on his trial for his life, and that, too, directly at the hands of the trial judge, who should have held evenly balanced the scales of justice, and left the jury free and untrammelled in its deliberation." Heretofore, in passing upon the principle advocated by appellant, this court, in equally as vigorous language, has said on this question that the jury, when it retires to consider of its verdict, should be left absolutely free from any and all outside influences. When it retires, it is supposed to be alone and in seclusion, so to speak, there to consider the case submitted to them with perfect freedom, and there to deliberate undisturbed by any outward influences. This principle has been emphasized recently by this court in the case of *Tollie May v. State*, 54 South, 70. Other cases, in a more or less degree controlling of the question here presented, are as follows: *Green v.*

State, 53 South. 415; *Shaw v. State*, 79 Miss. 577, 31 South. 209; *Brown v. State*, 69 Miss. 398, 10 South. 579; *Tarkington v. State*, 72 Miss. 731, 17 South. 768; *Senior & Sons v. Brogan*, 66 Miss. 178, 6 South. 649; *Barnett v. Eaton*, 62 Miss. 768.

Upon this contested point we will first let the record speak for itself. The only evidence on this point was given by Mr. Ferguson. Upon motion for a new trial, Mr. Ferguson, being duly sworn, testified as follows: "Q. What are your initials, Mr. Ferguson? A. A. J. Q. You were one of the sworn bailiffs in the charge of the jury? A. Yes, sir. Q. Who was the other bailiff? A. Mr. Roberts. Q. What time did the jury arrive at a verdict? A. I can't say exactly. It was some time in the neighborhood of 9 o'clock Saturday night. Q. Whom did you report that fact to? A. We reported it to Col. Harding [the sheriff]. Q. You did that with a view of getting Judge Miller to come back up here? A. Yes, sir. Q. Where was Judge Miller at that time? A. I suppose he was home, in Hazelhurst. Q. Did you deliver him any note from the jury? A. Yes, sir. J. Do you know what was in the note? A. I think it was asking permission to take a walk Sunday morning and evening. Q. Do you remember what statement they made in the note with reference to finding a verdict? A. As well as I remember, they said that they were hopelessly hung. Q. Have you any idea how they stood then? A. Going to supper, Saturday night, I understood there was four for acquittal, four for a life sentence, and four for hanging. Q. And you say they reached a verdict about 9 o'clock Saturday night? A. Yes sir. Q. What statement did Judge Miller send back to the jury room? A. He said, if they reached a verdict before 9 o'clock he would receive it. He said he wouldn't receive a verdict on Sunday." Cross-examination: "Q. Did Judge Miller say they might take a walk? A. Yes, sir. Q. What was it

Judge Miller said when you took him the note? A. He said he would receive a verdict if it was brought in about 9 o'clock, but, if not, he would go to Hazelhurst, and would not be back until Monday morning. Q. When they reached a verdict, you reported to them that Judge Miller had gone to Hazelhurst? A. Yes, sir." It was agreed that the jury retired between 7:30 and 8 o'clock Friday night, after the argument had been closed. It was agreed that the note that was sent to Judge Miller from the jury be filed as an exhibit to this motion, if it can be found. .

From this testimony it clearly appears that the jury retired to consider of their verdict between 7:30 and 8 o'clock p. m. Friday evening, and that on the following Saturday evening they sent a note to the judge, through the bailiff, "asking permission to take a walk on Sunday morning and evening," and it further stated "they were hopelessly hung." Judge Miller sent them word by the bailiff that "he would receive a verdict if it was brought in by 9 o'clock, but, if not, he was going to Hazelhurst, and would not be back until Monday morning," and that "he would not receive a verdict on Sunday." Bear in mind that he further stated that permission would be granted them to take a walk on Sunday morning and evening. It is vigorously pressed that this was an improper communication to the jury, and that its tendency was to coerce the jury into a verdict. When this testimony is fairly considered, we think it falls far short of showing that it could have been prejudicial to the interest of defendant. We think the judge acted strictly within his judicial rights, and that what he did was not improper. The action of the judge on this occasion is not violative of any of the principles laid down in the numerous decisions above quoted. In this action of the court, we see no error.

It is strongly contended that the second and third instructions granted the state were erroneous and mis-

leading. We have carefully examined these two instructions, along with all the other instructions in the case, and we are thoroughly satisfied that they, taken as a whole, fairly presented the law of the case to the jury.

Counsel for appellant, with great zeal and earnestness, contends that it was error to admit the dying declaration of John Wiltcher, made to Dr. Frizzell, to the effect that, "when he walked toward the gate at the time he was shot down, he saw two men standing at the gate." Dr. Frizzell stated that, when he was called to see the deceased, it was 4 or 5 o'clock in the morning, and that he found the deceased was mortally wounded, and that he was suffering very much, and that it was his opinion that he must soon die. However, he stated that the deceased did not say to him, or to any one in his presence, that he thought or believed that he was going to die. The court permitted the doctor to relate what the deceased said to him. Abstractly considered, this would not be admissible; but appellant overlooks the fact, when deceased was shot down about 9 o'clock that night, that a Mr. Henderson, a near neighbor, heard the gun fire and the cries of distress, and ran over to Wiltcher's house immediately, and there saw him, which was about ten minutes after he heard the gun fire. The dying man stated to Henderson, after Henderson told him that he had telephoned for Dr. Frizzell, "The doctor can't do me any good; I won't be here long," and then made a statement to Henderson as to how he was killed, which was, in substance, the same thing he told Dr. Frizzell some hours afterwards. The deceased died about 11 o'clock next day. If the deceased knew, when Henderson got there, that he was dying, then it is certainly not likely that he had any reason to believe otherwise when he made the statement to Dr. Frizzell, some seven or eight hours afterwards, when the testimony and his physical condition show that he grew weaker and weaker

from the hour he was shot to the moment of his death. It is not suggested in the record anywhere that the deceased, at any time during his illness, had or expressed any hope of recovery. Taking this in the light of the nature and extent of his wound, his physical state, his evident danger, his conduct, the occurrence of death soon thereafter, and all other circumstances connected therewith, we are of the opinion that the trial judge committed no error in admitting as evidence the dying declaration of the deceased as related by Dr. Frizzell.

It is said that it was manifest error, highly prejudicial to the defendant, to permit the witness Betty Price to testify, over the objection of appellant, that a month before the murder of deceased Mrs. Wiltcher told her that "she was going to have her husband killed." It is true, as stated by appellant, that the statement made by one conspirator before the conspiracy is formed should not bind his co-conspirators. The testimony in this case leaves it in doubt whether the time this statement was made by Mrs. Wiltcher was before or after the conspiracy was formed; but we rather think that the evidence tends to show more strongly that it was before the conspiracy was formed. It is further contended that it was error to permit Rosa Price to testify, over the objection of appellant, that when she and Will Price were going to John Wiltcher's house, the night he was killed, Will Price said to her, when they arrived at the shop: "I am going to kill Mr. Wiltcher. If I don't kill him, Cousin Rosa, Mr. Lee and Miss Lulu are going to kill me to-night or early in the morning." The record shows that this statement was made some ten or fifteen minutes before the gun fired that killed John Wiltcher, and at a time when Price was not more than twenty or thirty yards from the spot where Wiltcher was killed. It was error in the court in admitting that portion of the testimony of Bettie Price and Rosa Price as above pointed out; but, taking into consideration the nature of

their testimony, it is manifest, from the character of all the proof as contained in the whole record, that it was error without injury, harmless error. The indictment charging him with murder was legally founded and returned. He was tried by a fair and impartial jury, composed of his peers. The evidence established his guilt. Indeed, there is nothing in the record suggesting a well-founded doubt upon this question. With the record showing all this, we are unwilling to reverse the case upon a mistaken judgment of the trial judge as to the admissibility of certain testimony, which it is manifest did not deprive the defendant of a substantial right, and could not possibly change the verdict of the jury. After a careful and thorough review of the entire record, we fail to discover any error which will warrant us in setting aside this verdict.

We think the sentence imposed thereon by the court should be inflicted. The evidence shows that he was guilty of a most foul assassination, inspired by as base a motive as ever entered the human heart. Human life is sweet to all. It is a most precious and sacred thing; indeed, it is our all. The one who destroys it, without justification, should be made to feel the iron grasp of the strong arm of the law, by inflicting the punishment prescribed by it. "Laws are made to be enforced. Punishments are prescribed to be inflicted. If men do not respect the law, they must at least be made to fear it, and to know that, while justice may move with a leaden tread, it crushes with an iron heel."

Affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for reasons therein indicated by the Commissioner, the case is affirmed.

MRS. ANNIE E. IRWIN ET AL. v. YAZOO & MISSISSIPPI VAL-
LEY RAILROAD.

[55 South. 49.]

1. *DEEDS. Release of claim for damages. Parol evidence to vary writing.*

Where the owner of a tract of land conveyed a part of it to a railroad company for a right of way for its railroad track and for railroad purposes, all damages resulting to the rest of the tract were thereby released and the fact that, simultaneously with the execution of this deed, another deed was made to another party by which he divided the land into separate lots, does not alter the situation.

2. *PAROL EVIDENCE TO VARY WRITTEN AGREEMENT.*

Where the owner of land conveyed it to a railroad company "for a right of way for its railroad tracks and for railroad purposes," the fact that there was a verbal agreement, not included in the written agreement between the railroad company and the owner that a portion of the lands so conveyed should be used only for depot purposes, cannot be shown by parol evidence.

APPEAL from the Chancery Court of Tunica county.

HON. M. E. DENTON, Chancellor.

Suit by Mrs. Annie E. Irwin and others against the Yazoo & Mississippi Valley Railroad Company. From a judgment dissolving the injunction and dismissing the bill the complainant appeals.

The facts are as follows:

The land on which the town of Tunica is located was formerly owned by one Harris. When the predecessor to the appellee built its lines of railway, Harris deeded to the railroad company for right of way and railroad purposes a strip of land fifty feet in width on the east side of the center of the right of way and seventy-six and one-half feet on the west side thereof; it being understood that a depot and other buildings would be located on the west side of the track. The town of

Tunica was located on both sides of the railroad, a large number of the business houses being located west of the railroad track, and facing what is known as "Edwards Avenue West." Appellants acquired considerable property on Edwards Avenue West, opposite the depot and side tracks of the railroad company. The railroad constructed a long side track, known as the "passing track," on the east side of the center of defendant's right of way, and another side track, known as the "house track," and on the west side of the right of way, on the west of this latter track, it erected a depot for handling passengers and freight, a platform for cotton, etc. Being desirous of enlarging its depot facilities, the railroad company prepared to construct another side track, which would run around the west side of the depot upon the western part of the land conveyed by Harris to the railroad company as a part of its right of way, being on the western edge of the seventy-six and one-half foot strip west of the center of the right of way, which had previously been unused and unoccupied. The railroad company is met with an injunction sued out by appellants, owners of the property adjacent and abutting.

The petition for injunction alleges that the use by the railroad company of the western part of this strip of land, by laying side tracks and running locomotives and setting out cars on the same, will work a great injury to the abutting property owners; that it will make the street upon which their property faces (Edwards Avenue West) much narrower, and that the smoke and noise and vibration is injurious, and that laying this track as contemplated will cause appellants to suffer a great money loss as well as inconvenience. The petitioners contend that the railroad company has dedicated the land along the western border of its right of way west of its depot to the public as a street, and that it has no right now to obstruct this street, and that said

vacant space, which has been used by the public for more than ten years, has become a part of the public street, and that the railroad company cannot take same without due compensation to the abutting owners, as that would be an additional burden on them. They pray an injunction to prevent the railroad company from constructing its track as contemplated.

The appellees answer, denying the allegations of the petition, and deny that they have ever dedicated this portion of their right of way to the public as a street, and aver that their right or title to same has never been surrendered, and that the public had no exclusive use of this part of the right of way, and aver that the side track will be located entirely on the right of way, and that it is necessary for the proper handling of the traffic that these additional improvements be made. It is shown that, when appellants purchased the property from Harris, all streets and alleys were excepted, and also the right of way of the railroad company. It is also shown that similar exceptions are made in the deed by Harris to a large number of lots to the Financial Improvement Company.

Upon the hearing the court dissolved the injunction and dismissed the petition, and from such judgment an appeal is taken.

Julian C. Wilson and John T. Lowe, for appellants.

The only claim or release of damages by the railroad is on the ground that Harris, the vendor of complainant, made a deed to the twenty-six and a half foot strip for railroad purposes, and this operates as a release on his grantees.

It is true that the complainant bought some of his property from Harris, and some of it from the Financial Improvement Company which was selling for the railroad, as the evidence fully discloses.

This is on the theory that this new damage was compensated for when the original grant was received from Harris. Mr. Harris, however, testifies that he was asked to grant this strip of land, the understanding was that it was to be used for the depot and as an approach to the depot and not for tracks, especially switch tracks. And it was for this that he made the grant and for this he was supposed to have been compensated, although as a matter of fact, he gave this strip of land and half the town for the privilege of having the railroad build its depot.

He distinctly testifies that this sort of use was not in contemplation. That he was induced to give this land for depot room and approaches. This alone answers the proposition that the damages were compensated for and released in the original grant.

In 2 Lewis on Eminent Domain, 3rd Ed., sec. 476; 2nd Ed., 1st, vol., p. 295, it is said:

“Where a right of way was conveyed by deed upon oral representation that it was to be used for a main line only, and switch tracks were afterwards placed thereon, it is held that the purpose for which the deed was made could be shown, and that a recovery could be had for any damages to the grantor’s property in excess of that resulting from the main line. Where a deed of right of way was given in pursuance of and as an incident in carrying out a comprehensive verbal agreement, the sole agreement may be shown.” *Denisthorpe v. Fremont, etc., R. R. Co.*, 30 Neb. 142, S. C. 46 B. W. 240; *St. Louis, etc., R. R. Co. v. Crandall*, 75 Ark. 89, S. C. 112, Am. St. Rep. 42.

It must be borne in mind that at the time this grant from Harris was made to the railroad, the Constitution of 1869 was in force, which only permitted Harris damages for property taken and did not permit him to recover for property damaged.

It is true that under the Constitution, where part of a tract was taken, the rest of that tract, which was damaged, was compensated for. We do not mean to be technical, except in answer to technical propositions. As a matter of fact, any human being knows that Harris was not releasing damages when he made this deed and that Harris was giving the railroad the right to build on that property in a way then known and contemplated, and did not and could not have dreamed that they would afterwards encircle the depot with a net work of tracks to put them in close juxtaposition to the leading stores of the town.

The defendant, however, proceeded on a theory to the effect that Harris was releasing all subsequent damages to his vendees for any use to which the railroad desired to put the land, and we were obliged to show that his theory of law does not meet this case.

The effect of Harris' grant was the same as a condemnation proceeding against Harris, no more and no less. Second Lewis on Eminent Domain, 3d Ed., sec. 474; 2d Ed., sec. 293, is as follows: "The conveyance of land for a public purpose will ordinarily vest in the grantee the same rights as though the land had been acquired by condemnation. The conveyance will be held to be a release of all damages, which would be presumed to be included in the award of damages if the property had been condemned. . . ."

On page 848: "In general a grant is a bar to such and only such damages as would be included in the assessment or award in case of condemnation. The damages presumed to be included in the assessment or award in case of condemnation. The damages presumed to be included in the assessment or award are the subject of a subsequent chapter, where the matter is treated at length (citing chapter 25, from which we shall presently quote). It is sufficient for the present purpose to establish the principle that a deed is a bar to any damages which would

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Brief for appellants.

be barred by a condemnation proceeding. Such grant does not bar the right to recover for damages caused by the construction of works upon land taken from other proprietors, nor does it bar a claim for damages to an entirely distinct tract." *Chicago R. R. Co. v. Hazels*, 42 N. W. 96.

Of course this would not be the rule now, under the Constitution of 1890, but the question is: What was compensated for in 1884 when this grant was made? And it is shown in 2d Lewis on Eminent Domain, 3d Ed., sec. 823; 2d Ed., sec. 568A.

"The assessment and payment of damages for the taking of a tract, or part of a tract of land, are no bar to a subsequent suit for damages to a distinct tract of land belonging to the same proprietor. This is but the converse of the rule that in estimating compensation for property taken, damage to an entirely distinct and separate tract of land cannot be considered."

To the same effect is the same book, 3d Ed., sec. 697; 2d Ed., sec. 474.

It being established that in 1884 under the Constitution of 69, Harris could not have received for and therefore did not release subsequent damages to a distinct and separate tract of land. It then remains to be seen what are distinct and separate tracts of land, and second whether these lots west of Edwards avenue were distinct and separate tracts of land from the strip of ground on which the track is located east of Edwards avenue west, and eighty feet from it.

We are dealing now with town property, urban lots. The most conservative rule is that *prima facie* lots platted into blocks and not used for the same purpose are considered separate tracts. If, however, they are used and improved for one purpose, they are not separate tracts.

For instance, two lots in a block, all of which belong to the same owner, were taken for a railroad; all were vacant and unoccupied. It was held that damages to the

other lots could not be recovered, there being no connected use.

Where a block is divided by a street, the parts become distinct tracts as to each other, where they are mainly held for sale or use as building lots.

It is held that the subdivision of land into lots, makes each lot *prima facie* a separate and distinct tract, and if the owner claims damages to all, or more than the lot taken, he must produce evidence to overcome this presumption. Lewis on Eminent Domain, vol. 2, rd. Ed., sec. 699; vol. 2, 2d Ed., sec. 475; *Donisthorp v. Fremont R. R. Co.*, 46 N. W. 240; *Wiley v. Elwood*, 25 N. E. 570.

Mr. Lewis states the true rule to be that vacant lots and blocks held for sale or speculation and separated by streets and alleys, should be regarded as distinct tracts. See section 699.

This is the rule in Illinois and is the most conservative rule on the subject. See, also, *Wilcox v. St. Paul R. R. Co.*, 29 N. W. 148; *Koerper v. St. Paul R. R. Co.*, 44 N. W. 195; *White v. Metropolitan R. R. Co.* (Ill.), 39 N. E. 270.

Of course, if these lots are used for a connected purpose, the rule does not apply, and they are regarded as one tract. But where they are merely platted and held for sale as building lots, they are separate tracts under most of the decisions, and are so under all the decisions, where they are separated by streets or alleys, or are in separate blocks.

If they are regarded as such separate tracts under the old constitution, no compensation was included or damages released. Indeed, it is impossible to see how such damages could have been contemplated or released, because the law at that time gave none.

St. John Waddell and Mayes & Longstreet, for appellee.

The case at bar is clearly in the class of cases where the right of way was originally a part of a tract owned by

one person, and in acquiring the right of way, the owner was settled with, not only for the value of the right of way actually occupied and taken, but also for all damages which were then known to necessarily result to his adjacent lands by reason of the purpose for which the right of way was granted, and the reasonable uses within these purposes it would be used for.

The class of cases decided by this court holding that an owner of property adjacent to a right of way, can, under the Constitution of 1890, recover damages for injury to said property, or for injury to some right growing out of the same, although no part of the property was ever taken, is cited in the following cases: *King v. Railroad Co.*, 88 Miss. Rep. 456; *Railroad Co. v. King*, 47 So. Rep. 857.

The class of cases decided by this court, holding that where part of a tract is taken or condemned, that the land owner under the old Constitution of 1869 should be paid the fair market value of the property taken, and all damages to his adjacent property occasioned by the taking of the same, considering the public use for which the same would be used, are cited in the following cases: *Isham v. Railroad Co.*, *supra*; *Richardson v. Levee Commissioners*, 68 Miss. Rep. 539.

If then, E. L. Harris, when he deeded appellee the right of way in question, was paid and received full consideration for the value of the same, and all damages which his adjacent property would sustain by reason of the taking of same, and growing out of the uses for which said right of way would be used, and it being then shown and intended by him that he would use the property bordering on the west line of Edwards avenue west, for the purpose of building thereon, stores, hotels, banks, and other business houses, then when the appellant afterwards purchased said property from him, he did so subject to the rights of appellee on its right of way, and cannot now complain of any proper use that the appellee

makes of said right of way within the purposes for which the same was acquired by it; any other rule would subject the appellee to the payment of the same damages to each succeeding purchaser of the property, and it would have no protection, in the fact that it had previously paid same to the proper party entitled to receive said damages.

There is nothing ambiguous in the right of way deed. It is clear and explicit, and does not need a court to construe it, or tell its meaning, and by its plain language, it grants to the railroad company the full width of the right of way through the town for railroad purposes, and the appellant claims title to all of the property he owns in the town of Tunica under E. L. Harris, or in other words, the parties to this suit both claim title derived from a common source, and there is nothing obscure or ambiguous, or that needs construction in the deed, under which the appellee claims title.

Again counsel for appellant in his brief, claims that his theory of the construction of the right of way deeds is strengthened by what E. L. Harris understood his deed to mean when he executed it, and the way he understood the railroad company would use the right of way granted. I respectfully submit, that any testimony of Mr. Harris as to how he thought the railroad company would use the right of way when he made the deed, is extremely incompetent and irrelevant, and he ought not to be permitted in any court, after executing a solemn deed, to come forward twenty years afterwards and say that he thought so and so, at the time he executed it, and seek to impair the ordinary meaning and effect of his grant, and for which he was paid full consideration.

Argued orally by *Julian C. Wilson*, for appellant, and *C. S. Sively* and *St. John Waddell*, for appellee.

SMITH, J., delivered the opinion of the court.

Nothing contained in the deed from Harris to the railroad company and to the Financial Improvement Company, nor in the conduct of the parties after the execution thereof, constitutes a dedication of any part of the land in controversy to the town of Tunica or to the public for street purposes. Neither has there been such an adverse user of the lands by the public as to make it part of the street by prescription.

When the deed from Harris to the railroad company was executed, all damages resulting to the property now owned by appellants were thereby necessarily released, for the reason that at the time Harris was the owner of the entire tract of land out of which the lots now owned by appellants were carved. The fact that, simultaneously with the execution of this deed, another deed was made by Harris, by which he divided the land into separate lots, does not alter the situation.

It may be that Harris and the railroad company had a verbal agreement that the additional twenty-six and one-half feet of land conveyed was to be used only for depot purposes; but this agreement, not having been included in the written agreement contained in the deed, cannot, under elementary rules, be now added thereto by parol. According to the deed, the land was conveyed "for a right of way for its railroad track and for railroad purposes."

Affirmed and remanded.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE Co. v.
ALLEN WALKER.

[55 South. 51.]

1. INSURANCE. *Limitation of liability. Regulation. Police power. Code 1906. Section 2575.*

The state under its police power has the right to regulate the business of insurance, and provide the kind and character of insurance contracts which may be made.

2. INSURANCE. *Limitations of liability.*

A provision in an accident policy limiting the insurers liability to one-fifth of the amount of insurance unless notice of the accident be given to the insurance company within ten days thereafter is void as in contravention of Code 1906, section 2575, prohibiting stipulations in insurance policies limiting the bringing of suits.

3. SAME.

Any contract of insurance which undertakes to relieve the insurance company from responsibility on its contracts by requiring any kind of notice for less than the time required by the statute is in conflict with section 2575, Code 1906, and void.

APPEAL from the circuit court of Forrest county.

HON. W. H. COOK, Judge.

Suit by Allen Walker against the General Accident, Fire and Life Assurance Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Stephens, Stephens & Cook, for appellant.

The provision for notice of injury within ten days from the date of injury is valid and binding. The authorities are multitudinous and harmonious on this point. See Cyl., vol. 1, page 274, paragraph "A" and citations there given. Am. and Eng. Ency. Law, vol. 1, page 323, par. 3; in *Craig v. U. S. Health & Accident Ins. Co.*, 61 S. E.

423 (Sup. Ct. S. C., '08), and *Hatch v. U. S. Cas. Co.*, 83 N. E. 398 (Mass., '08), it was held that the requirement of clause "M" of the policy is valid. "The circuit court in affirming the judgment of the magistrate held the provisions of the policy (above referred to) as to time in which notice of sickness should be given, to be without effect and void, because unreasonable. We think this decision of the circuit judge was clearly erroneous. It concerns not only the constitutional rights, but in the highest degree the business prosperity of the people, that freedom to contract should be preserved inviolate. It is true freedom to contract is not unlimited, for the lawmaking hand of the government may impose such limitations as can be reasonably considered to be for the public health, safety, or morals." In the case last above cited the court said:

"If it be said, as it sometimes is, that such a defense is purely technical, the answer (if one is needed) is that the provision for notice is the essence of the contract, that it is manifestly an important provision for the protection of the insurer against fraudulent claims, and also against those which, though made in good faith, are not valid. It is a provision which tends to the lucidation of the truth when claims for indemnity are made. It is one to which the assured agreed and it is not unreasonable." *Hatch v. U. S. Casualty Co.*, 83 N. E. 398 (Mass., 1908).

In *Heywood v. Acc. Assn.*, 85 Me. 289, 293 (1893), the contract said: "The policy contained a stipulation that failure to notify the company of the injury for ten days after it was received should bar all claim therefor. It was competent for the parties to make the agreement, and they are bound by it." See, also, *Kimball v. Acc. Assn.*, 90 Me. 183, 185 (1897); *Wholen v. Equitable Acc. Co.*, 58 A. 1057 (Me. 1903); *Johnson v. Ind. Cas. Co.*, 60 A. 1009 (N. H. 1905); *Blockman v. Casualty Co.*, 117 Tenn. 578, 588 (1906); *Dunsher v. Travelers' Ins. Co.*, 25 Pa. Sup. Ct. 559, 563 (1904); *Foster v. Fid. & Cas. Co.*, 40 L.

Brief for appellee.

[99 Miss.]

R. A. 833 (Wis. 1898); *United Benefit Assn. v. Freeman*, 36 S. E. 764; *Martin v. Equitable Acc. Co.*, 16 N. Y. Supp. 279; *Travelers' Ins. Co. v. Nox*, 142 Fed. 653; *Woodens' Acc. Assn. v. Byers*, 87 N. W. 346; *James v. U. S. Cas. Co.*, 88 S. W. 125; *Bezell v. Ins. Co.*, 176 Mo. 279; *Grant v. N. A. Cas. Co.*, 83 N. W. 316; *McCord v. Masonic Cas. Co.*, 88 N. E. 6 (Mass., 1909); *Williams v. U. S. Cas. Co.*, 64 S. E. 410 (N. C., 1909); *N. A. Accident Ins. Co. v. Watson*, 64 S. E. 693 (Ga., 1909); *Woodall v. Fidelity & Gass Co.*, 62 S. E. 808 (Ga., 1908).

Clyde R. Conner, for appellee.

An examination of the policy sued on shows that at paragraph "M" notice is required to be at the office of the corporation in Philadelphia, Pa., within ten days of the accident. Now the notice which was mailed to the Philadelphia office, and it is similar to the one left with appellee when his policy was issued, can be found in this record as exhibit "A" to the depositions of J. J. Krist. In the upper right hand corner of said notice there appears the following: "To be filled out by the assured. Note. Immediately after the happening of the accident this blank must be executed by claimant and physician and forwarded at once to the company at Philadelphia, Pa. Every question must be answered fully. This clause is made a part of the insurance contract by the corporation requiring the assured to send this particular blank notice on the happening of an accident. It can readily be seen that paragraph "M" in the policy and this clause in the blank preliminary notice of accident, which the corporation required claimant to fill out and send to it immediately, are contradictory. Which will this court enforce? The paragraph "M" in the policy requires that the notice must be at the Philadelphia office of the corporation within ten days of the date of the accident, or after the injury, or else four-fifths of the principal sum of the policy must be forfeited.

We will admit that a large per cent of the cases cited by counsel hold that the ten days' notice clause to be reasonable and binding on the assured. The facts in the case at bar are different from all of those cited, in that the record, although it is not as clear as it could be, shows that it took eight days for this preliminary notice to go from Sumrall, Mississippi, to Philadelphia, Pa., office of the corporation. The witness Walker says that the notice was filled out by Heidleberg, and is a part of the record in this case as an exhibit to J. J. Krist's testimony; then two or three days afterwards the doctor filled out the other side and mailed it to the corporation. Now an examination of this notice in the upper right hand corner shows that Dr. Anderson filled it out on April 20th. The witness first testifies that it was received at the corporation's office on the 28th, or eight days later. The witness Walker further testifies that the doctor would not allow anyone to see him until three or four days after the injury. We see from this that the ten days notice in this particular case really amounts to requiring the appellee to give notice of the injury within two days after the date of the accident. Now this fact, viewed in the light of the undisputed testimony that the doctor would not allow anyone to see appellee for three or four days after the accident, would actually amount to requiring the assured to give notice of the injury at least one day before the accident happened, and we do not believe that this or any other court will hold this provision to be binding in this particular case. And especially is this true when the blank form of preliminary notice of accident says that the notice should be sent into the Philadelphia office of the corporation immediately after the accident. Let it be borne in mind that the only defense interposed in the court below was that the appellee failed to give notice of the injury within ten days after the date of the accident; therefore if this defense fails them then surely we were entitled to a verdict.

MAYES, C. J., delivered the opinion of the court.

On the trial of this case the court gave a peremptory instruction to the jury to find for appellee in full amount sued for and to which he claimed to be entitled under the accident policy. It is contended by appellant that this was error, and hence an appeal is prosecuted.

The only feature of this case which we desire to discuss is the effect which section 2575, Code of 1906, has upon that clause of the contract of insurance which limits the right of the insured to a recovery of only one-fifth of the insurance, unless written notice shall be served on the company at its office in Philadelphia, Pa., within ten days from the date of the happening of the accident rendering the company liable on the policy. It appears that Allen Walker procured an accident policy entitling him to the sum of one hundred dollars in case of accident resulting in a severance of either hand at or above the wrist. The accident insured against happened, and this policy was in full force at the time. Under a clause in the policy he became entitled to the sum of one hundred dollars. But there is another clause in the policy which provides that if written notice of accident or injury, etc., be not given to the corporation at its office in Philadelphia, Pa., within ten days after the accident happens, the assurance company shall only be liable to pay one-fifth of the amount which would otherwise be payable under the policy. It is contended on the part of appellant that this notice was not given, and because it was not given it is not liable to Walker, except for twenty dollars or one-fifth of the amount he would be entitled to, had he given the notice. We do not consider the question as to whether or not the assurance company waived this clause, deeming it unimportant in the light of the other question discussed in this opinion.

The question which we should decide is the validity of this clause, when considered in connection with section 2575, Code of 1906. That a state has the right to regu-

late the business of insurance, and provide the kind and character of insurance contracts which may be made, is beyond controversy. It is one of the most important police powers exercised by the state.

Section 2575 of the Code provides that: "No company shall make any condition or stipulation in its insurance contract concerning the court or jurisdiction wherein any suit thereon may be brought, nor shall they limit the time within which suit may be commenced to less than one year after the loss or injury, and any such condition or stipulation shall be void." The clause in the policy which requires written notice within ten days as a condition to liability on the part of the assurance company for the full amount named in the policy and for which the insured pays his premiums is in conflict with the statute above quoted. Under the terms of this policy Walker became entitled to recover the sum of one hundred dollars. The company contracted to pay this sum to him, and accepted his money for the premiums as a consideration for this contract. The risk which they insured against happened, and they now undertake to avoid payment of four-fifths of it on the ground that they did not receive written notice in ten days. The contract is plain in its terms, and no stipulation in the contract as to the time of giving the notice can reduce the liability which the company undertakes to assume, if the stipulation as to time be less than that which the statute prescribes.

The clause under consideration is an attempt to evade the statute, or amounts to an evasion of it, if it should be enforced. The clause referred to in this policy is nothing but a limitation that no suit shall be entertained to recover the full amount of the policy, unless preliminary steps looking to the suit be commenced within ten days from the accident, whereas the statute provides that there shall be no limit for less than a year. It is true that this condition excludes not all, but four-fifths, of the amount; but the principle is just the same as if it pro-

vided that no suit should be begun to recover any part of the policy unless written notice should be given within the ten days. Any contract of insurance which undertakes to relieve the insurance company from the full responsibility on its contract by requiring any kind of notice for less than the time required by the statute is in conflict with section 2575, Code of 1906, and void. The reasonableness of the time within which the notice is required might play a part in this case, were it directly involved.

Affirmed.

C. W. OSBORNE v. STATE.

[55 South. 52.]

1. CRIMINAL LAW. *Conspirators. Evidence. Credibility of witnesses. Completion of offense. Code 1906, section 1026.*

The question of the credibility of a witness is one which belongs exclusively to the jury.

2. ACCOMPLICE. *Credibility.*

While the testimony of an accomplice should be received and weighed with great distrust and jealousy by the jury, it is still the province of the jury to determine what credit to give to the testimony of an accomplice from his manner and general appearance upon the stand and all other surrounding and attending circumstances and it is the jury's privilege, if they see proper, to believe him without corroboration.

3. ADMISSION OF CONSPIRATORS. *Admissibility.*

Where a conspiracy has been established, the admissions of one or more of the conspirators are admissible to affect their associates only when made during the progress or in the prosecution of the unlawful design about which they have conspired; and hence if made after its completion, or abandonment, they are inadmissible.

99 Miss.]

Statement of the case.

4. SAME.

Acts or declarations of conspirators are not always excluded because they were done or made after the commission of the crime. If for any reason as for escape or concealment, division of profits, or realization of benefits, the common purpose continued, declarations in furtherance thereof are admissible, although the crime which was the object of the conspiracy has been consummated.

Where a defendant is charged together with several co-conspirators with burning a stock of goods with intent to defraud an insurance company, a plea of guilty by his co-conspirators to an indictment charging them with burning the house in which the goods were located at the time of the burning is admissible to show that the fire was of incendiary origin. But this evidence was not competent for the purpose of proving that the intent was to defraud the insurance company, nor was it competent to show that defendant had any guilty connection whatever with the other conspirators in the unlawful burning.

5. CODE 1906, SECTION 1026.

While it is true that under Code 1906, section 1026, an accessory can be tried and punished as a principal, before or after the principal has been tried, nevertheless, where several are indicted jointly for a felony, if the evidence shows that one or more were accessories before the fact, though charged in the indictment as principals, it is absolutely necessary to prove the party guilty who actually committed the felony before proof can be secured of the guilt of the accessories before the fact, although they are charged in the indictment as principals.

6. CRIMINAL CONSPIRACY. Evidence.

Before the declarations of one party can be received in evidence against another in a criminal prosecution there must be proof of a conspiracy *aliunde*. But a conspiracy can be proven like other controverted facts, by the acts of the parties or by circumstances, as well as their agreement.

APPEAL from the circuit court of Tallahatchie county.

HON. N. A. TAYLOR, Judge.

C. W. Osborne was convicted of burning a stock of goods with intent to defraud an insurance company, and appeals.

The facts are fully stated in the opinion of the court.

Dinkins & Caldwell, for appellant.

The rule with reference to the admissibility of statements and admissions of one conspirator against his fellows is, that after *prima facie* proof of the existence of a conspiracy is made, that such statements or admissions may be heard which were made before the crime was complete. Such statements and admissions made afterward are always rejected by the court. Nothing said or done by one conspirator against his fellow, not in his presence, subsequent to the execution of the common purpose, has been allowed by any of the superior courts to go to the jury. This rule is very satisfactorily stated in 12 Cyc., 435 *et seq.*, especially in par. 2, on page 439, but the courts of this state have so often, so clearly and so distinctly announced and enforced this rule that we shall confine ourselves mainly to reference to decisions of this court.

In the *Browning case*, 31 Miss. 657, a case like the one at bar, resting wholly upon circumstantial evidence, the court says:

“The offense charged, if committed at all, was unseen by all save the parties engaged in its perpetration. The whole transaction was shrouded in secrecy. The very fact of the homicide, as well as the question, who were the perpetrators of the deed, depended entirely upon indirect or circumstantial evidence. The charge, as laid in the indictment, pre-supposes the co-operation of at least two persons in the commission of the offense. It may hence well be conceded that peculiar and urgent circumstances existed in the cause, which authorized the application of the exception of the rule above stated, if any combination of circumstances could authorize a departure from the prescribed mode. But it should ever be borne in mind, that no man can be asserted to be legally guilty of an offense unless his guilt shall have been established according to the forms and principles of law; and that in no case should a disregard of either the law it-

self or its established forms be tolerated, from any considerations of difficulty in the conviction of offenders, or from the supposed manifest guilt of the accused."

This was said with reference to the admission of the acts and declarations of an alleged conspirator after the consummation of the conspiracy.

This reasoning in the *Browning case* has been followed by this court without variation ever since it was announced. It is quoted verbatim in the *Foster case*, 92 Miss. 257.

In the *Lynes case*, 36 Miss. 617, it was held error to refuse the following instructions:

No. 4. "That the confession of one accomplice or conspirator is no evidence against another unless made before the completion of the original design; and if the jury believe that the confession of Hightower was made after the killing of Landram, they are but a relation of past occurrences, after the purpose of the conspiracy had been accomplished, and are not evidence against the defendants on trial."

No. 6. "The actions and declarations of one of several conspirators, the conspiracy being first established, are evidence against the others, but such acts and declarations must have been performed and made during the pendency of the criminal enterprise, and before its completion or abandonment, or else, being no part of the *res gestae*, but the mere relation of a past transaction, and cannot be received by the jury as evidence to charge the other confederates."

In the *Garard case*, 50 Miss. 147, a like instruction was refused, which was held to be error by this court.

In the *Simmons case*, 61 Miss. 248, in which the defendant was charged with the murder of Gen. Tucker, the state was allowed to prove that Dick Shaw stated after the killing, that if he knew where the defendant was, he would write to him, and that his father would let him have a horse, if he needed one. Other conversations

of Shaw after the killing and in the absence of the defendant were given in evidence, all of which the court held to be error, though ample proof of the existence of a conspiracy was made. See, also, *Gillam v. State*, 62 Miss. 547; *Wilson v. State*, 71 Miss. 880; *Brown v. State*, 72 Miss. 990; *Foster v. State*, 92 Miss. 257.

The instruction refused in the *Lynes case*, *supra*, were almost identical with instruction No. 3, refused to the appellant. The same question presented by the instruction was also presented by objection to the testimony of the witness when delivered and by motion to exclude.

The trial court was asked in instruction No. 5, which was refused, to advise the jury that the testimony of the witness, Joe Williams, should be scrutinized with great care and caution on account of his connection with the crime charged against him, and that the jury should not only consider the said witness' connection with the crime charged, but also contradictory statements admitted to have been made by him.

Examination of the decisions of this court in the *Lynes case*, 36 Miss. 617; the *Green case*, 55 Miss. 455; the *Wilson case*, 71 Miss. 880; and the *Brown case*, 72 Miss. 990, make it clear that it is a defendant's right to have the jury so instructed. It is not merely how a jury may regard the testimony of an accomplice, but to advise them that such testimony is viewed with suspicion and distrust by the law. It is a legal question, a distrust or suspicion which the law entertains that the defendant is entitled to have the jury instructed upon.

It is true that the court may determine as to the language or wording of an instruction intended to express the law's distrust or suspicion of such testimony, but it cannot refuse the defendant's request to advise the jury upon so important matter. See especially the *Green case*, *supra*; instruction No. 2 asked by the defendant and refused by the court was in these words:

“The court instructs the jury that in determining your verdict you will not consider any evidence of the conviction of Joe Osborne or R. E. Tannery.”

The indictment and the conviction of both Joe Osborn and R. E. Tannery were introduced in evidence over appellant's objection, and his motion to exclude, afterwards made, was overruled.

The indictment was for a separate and distinct offense from that which appellant was on trial. No court, so far as we have been able to ascertain, has ever allowed the state to show on the prosecution of one conspirator, the conviction of his fellow, under the same indictment, but here, we have the record of a trial court allowing the state to introduce the record of the indictment and conviction of the appellant's co-indictees, for a separate, distinct and different offense under an indictment returned upon a different law.

The governing rule with reference to the question raised by the refusal of instruction No. 2 above, is stated in 12 Cyc. 445, as follows:

“Where two persons have been jointly indicted for the same offense, but separately tried, a judgment of conviction against one of them is not competent on the trial of the other, in as much as his conviction is no evidence either of joint action, or of the guilt of the accused. The same rule applies where two are separately indicted and tried for the same crime.”

The admission of the proof of the conviction of Joe Osborne and Tennery not only violates the rule as above announced, but also the rule which prohibits the introduction of admissions of co-conspirators made after the crime is complete. The right of a defendant in a criminal case, which our laws profess so jealously to guard, do not extend so far as to justify the introduction of such records in behalf of a defendant, and how it can be conceived that such records may be introduced by the state in its prosecution, can not be explained.

In *Nix v. State*, 34 S. W. 764, it was held that a statement made by a son, who was a co-conspirator, made after he had walked one hundred yards from the place of the killing, that his father had killed the decedent, was held not admissible. On this question, see *People v. Bearss*, 10 Cal. 68; *State v. Fertig*, 98 Ia. 139; *Clark v. Com.*, 14 Bush. (Ky.) 166; *People v. Mullins*, 5 N. Y. App. Div. 172; *People v. Kief*, 136 N. Y. 661; *State v. Bowker*, 26 Ore. 309; *Bell v. State*, 33 Tex. Cr. 163; *Harper v. State*, 11 Tex. App. 1.

Carl Fox, assistant attorney-general.

It is argued that testimony as to statements made by appellant's co-conspirators after the store had been burned was erroneously admitted. Counsel's theory is that the acts and admissions of co-conspirators done and made after the conspiracy is formed and before the object of it is consummated are admissible, and that the object of the conspiracy in this case was the burning of the stock of goods and that it was consummated when it was burned. I think counsel are in error. The object of the conspiracy was to defraud the insurance companies, and burning the store and stock of goods was merely a means to that end. When the admissions testified about were made, appellant had never settled with the insurance companies, but was trying to do so.

The correspondence between defendant and Dr. Emery extended from the latter part of March to the 27th day of April, the fire having occurred on the night of the 4th of February. The admissions of co-conspirators testified about by witnesses were made long before this correspondence. The object of the conspiracy, therefore, had not been accomplished. Moreover, the admissions objected to were made in an attempt to conceal the crime in pursuance of a purpose to enable the conspirators to escape punishment.

In 12 Cyc. 438, it is said: "1. Acts and Declarations Before Complete Fulfilment of Purpose.—Acts or declarations of conspirators are not always excluded because they were done or made after the commission of the crime. If for any reason as for escape or concealment the common purpose continues, declarations in furtherance thereof are admissible, although the crime which was the object of the conspiracy has been consummated.

"j. Acts and Declarations before Dividing or Disposing of Proceeds of Crime.—Where the conspiracy has for its purpose, not only the commission of a crime, but also a division of the profits, or the realization of the benefits which are the result therefrom, as in conspiracy to commit larceny or embezzlement, the declaration by one conspirator made after the crime, but before the subsequent arrangements are completed, are competent as against his co-conspirators."

It is argued that instruction No. 5, refused defendant, ought to have been given. It is improper to single out a witness by name and practically tell the jury that he is unworthy of belief. Instructions Nos. 10, 4 and 3 granted the defendant, and 5 granted the state, correctly stated the principle which appellant ought to have stated to the jury by said instruction No. 5, which was refused.

I do not think that instruction No. 6 granted the state fairly bears the interpretation put upon it by counsel for appellant. The instructions as a whole correctly announce the law, I think.

It is argued that it is error to admit the record of the indictment, plea of guilty, and sentence of Tennery and Joe B. Osborne for burning the storehouse (not the stock of goods). It was all the same burning. The evidence was perfectly competent. The theory being that these two conspired with appellant to burn the store, but that the actual setting fire to the store was done by Tennery and Joe B. Osborne, appellant being away on a hunting trip at the time, it was absolutely necessary to prove

that Tennery or Joe B. Osborne, or both, did set fire to the store. Joe Williams was discredited to some extent, and it was not incumbent upon the state to rest upon his testimony alone to prove this.

"That confession of a principal is admissible on the trial of the accessory to evidence the commission of the crime by the principal, seems clear on the present principle, supposing some evidence of the defendant's co-operation to be first furnished. But whether the judgment of conviction of the principal is receivable for the same purpose depends on the doctrine of the effect of judgments." 2 Wigmore on Evidence, sec. 1079; 12 Cyc. 195, and notes; see, also, *Givens v. State*, 103 Tenn. 648; *Howard v. State*, 109 Ga. 137; this is the rule in Mississippi; see *Keithler v. State*, 10 S. & M. (Miss.) 226; *Lynes v. State*, 36 Miss. 617.

The fact that Tennery and Joe B. Osborne plead guilty to a different indictment charging a different crime cannot affect the admissibility of their pleas of guilty and the records of their conviction. As I have stated, it was all the same fire.

Defendant did not admit that the fire was of incendiary origin, did not admit that Joe B. Osborne, Tennery or Williams had anything to do with starting the fire. The state relied upon the testimony of Joe Williams for proof of these facts and defendant made a strenuous effort to break down this testimony by impeaching Williams. The theory of the state was that defendant had procured Osborne and Tennery and Williams or one of them to set fire to the building for the purpose of defrauding the insurance companies. It was necessary therefore, in order to convict this appellant that it should be proved, first, that Joe B. Osborne, Tennery, or Williams set fire to the building; second, that it was done for the purpose of defrauding the insurance companies. Now, their pleas of guilty and the records of their conviction were competent evidence under the rule stated in the authorities

named above, including Mississippi cases, that the fire was of incendiary origin and that Tennery and Joe B. Osborne were the guilty parties. This evidence was not competent for the purpose of proving that the intent was to defraud the insurance companies, nor was it competent as proof that defendant had any guilty connection with Joe B. Osborne, Tenery and Williams in the unlawful enterprise. This cannot avail appellant anything, however, because only a general objection was made to the admission of this evidence.

"A general objection to the admissibility of evidence is insufficient unless the evidence objected to is palpably inadmissible for any purpose or under any circumstances." 12 Cyc. 563.

This is the rule in Mississippi. See *Lipscomb v. State*, 75 Miss. 559. Nowhere in the record does it appear that any specific objection was made to this evidence or that the court was asked anywhere to instruct the jury as to the purpose for which it was admitted or as to the facts which it was competent to prove.

Argued orally by *Carl Fox*, assistant attorney-general, for appellee; *Earl Brewer* and *Dinkins & Caldwell*, for appellant.

McLAIN, C.

This case was affirmed on a former day of this term (54 South. 450), without a written opinion. The attorney for C. W. Osborne, the appellant, filed a vigorous suggestion of error, based upon supposed errors in our former decision, and presents it in his brief with much skill and ability. In our former investigation, we were fully impressed with the magnitude and importance of the case. Each and every assignment of error in the record was thoroughly and deliberately considered by each member of this court. As a matter of course, we would not have affirmed it then, unless we had been satisfied that the appellant had secured a fair and impartial trial, as guaran-

teed to him by our Constitution and the laws of the land.

In this suggestion of error, we find no new questions presented; but from the importance of the case, and out of deference to the ability of counsel, coupled with the earnestness with which he presses his views, we have again thoroughly sifted, with great care, the entire record. But we find nothing therein to cause us to recede from our former opinion; but, on the contrary, this re-investigation has strengthened us in our conviction that our former decision was right. We will now proceed to consider, in a brief way, some of the suggestions of error relied on. We will not give an abstract of the testimony, as we are satisfied that the jury was fully warranted, under the evidence, in finding the defendant guilty as charged. However, we will say that the theory of the state was that C. W. Osborne, the appellant, Joe Osborne, R. E. Tennery, and Joe Williams conspired to burn the storehouse of J. R. Crow, which appellant was occupying at the time, conducting and carrying on a mercantile business. It is alleged that his stock of goods at the time of the fire was covered and insured against damage and loss by fire in the sum of three thousand dollars. R. E. Tennery, Joe Osborne, and Joe Williams were indicted jointly, charged under section 1040 of the Code of 1906, with the burning of the storehouse, with intent to injure the said J. R. Crow. C. W. Osborne, appellant, Joe Williams, Joe Osborne, and R. E. Tennery were jointly indicted for the burning of the stock of goods in the storehouse at the time of the fire, with intent to defraud the insurance company. This indictment was drawn under section 1041, Code of 1906. Joe Osborne, Joe Williams, and R. E. Tennery, pleaded guilty to the indictment charging them with burning the storehouse. One year or more afterwards, C. W. Osborne, the appellant, was put upon trial on the indictment charging him, Joe Osborne, Joe Williams, and R. E. Tennery with burning the stock

of goods contained in the storehouse, with intent to defraud the insurance company. Appellant was convicted and sentenced to the penitentiary for seven years. The other parties have not been tried upon this indictment; they having pleaded guilty at the former term of the court to the indictment charging them with the burning of the storehouse. At the time of the fire, appellant was some miles away, in another neighborhood, hunting with some friends. Joe Osborne was a cousin and employee of the defendant, working at the time in a storehouse in the town of Charleston, Mississippi, which belonged to the appellant. Joe Williams was a negro tenant on appellant's farm near the Payne store, that was burned, and R. E. Tennery had no business connection with the appellant, so far as the record shows.

The first contention by the attorney for appellant finds expression in the following: "Without Joe Williams' testimony, the state would entirely fail." And he insists that Joe's contradictory statements and general deportment are such, as shown by the record, as that the court would not be justified in sustaining this verdict. It is true that the record shows that Joe Williams had made, prior to the trial, many statements contradictory to his testimony delivered at the trial. Counsel earnestly insists here, and no doubt pressed with great force and eloquence to the jury, that Joe was unworthy of belief, because of these contradictory statements made on several occasions. It is well settled that the question of credibility of a witness is one which belongs exclusively to the jury.

It is further urged that he was an accomplice. This is true. The well-settled rule, announced by this court time and again, is that the testimony of an accomplice should be received and weighed with great distrust and jealousy by the jury. But it is equally as well settled that it is impossible to say, as a question of law, that he should not be believed. The jury was told this by

proper instructions. It is the province of the jury to determine what credit to give to the testimony of an accomplice, from his manner and general appearance upon the stand, and all other surrounding and attending circumstances. It is for them to say solely how far he has been corroborated. Indeed, it is their privilege, if they see proper, to believe him without corroboration. Under proper instructions, the jury in this case passed upon the credibility of the witness. How much weight if any, they gave it, we do not know. They may have attached much, little, or no importance to it. This court has held that, in passing upon the worth of the testimony of an accomplice, "the question of credibility is one which belongs so exclusively to the jury that it would be a delicate point for the court to touch it." *Keithler v. State*, 10 Smedes & M. 194.

Counsel further contends that the declarations alleged to have been made by the co-conspirator, Joe Osborne, were not admissible against C. W. Osborne, the appellant, because made after the completion of the crime. It is a well-settled rule—indeed, it is elementary—"that, even after a conspiracy has been established, the admissions of one or more of the conspirators are admissible to affect their associates only when made during the progress or in the prosecution of the unlawful design about which they have conspired; and hence, if made after its completion or abandonment, they are inadmissible." *Lynes v. State*, 36 Miss. 617. Counsel does not deny this principle of law; but he, with great force and earnestness, contends that, when the stock of goods was burned, the crime for which appellant is charged was consummated and completed. Counsel is in error. What was the object of the conspiracy? The evidence makes it as clear as the noonday that it was to defraud the insurance company. The burning of the store and stock of goods was the means used to accomplish that end. At the time these admissions are claimed to have been made,

C. W. Osborne, the appellant, had not succeeded in getting a settlement with the insurance company; but the evidence shows that he was using his best efforts to do so, and these efforts continued up to April 27th, the fire having occurred on February 4th, prior. These alleged declarations of the co-conspirators, testified about by witnesses, were made some time between February 4th and April 27th. At this time the object of the conspiracy had not been accomplished. These alleged declarations were properly admitted. "Acts or declarations of conspirators are not always excluded because they were done or made after the commission of the crime. If for any reason, as for escape or concealment, the common purpose continues, declarations in furtherance thereof are admissible, although the crime which was the object of the conspiracy has been consummated." 12 Cyc. 438, i. "Where the conspiracy has for its purpose, not only the commission of a crime, but also a division of the profits, or the realization of the benefits, which are the results therefrom, as in conspiracy to commit larceny or embezzlement, the declarations by one conspirator, made after the crime, but before the subsequent arrangements are complete, are competent as against his co-conspirators." 12 Cyc. 438, j.

It is further insisted that it was error to admit evidence of the pleas of guilty of Joe Osborne and R. E. Tennery. In support of this contention, counsel for appellant contends that the pleas of guilty were to an indictment for a different crime (burning of storehouse) than the one lodged against appellant (burning of goods), and therefore it in no way showed appellant's connection with the case. There is no merit in this contention. The pleas of guilty were admissible. They showed a confession on the part of Joe Osborne and Tennery. It is true these pleas of guilty were to an indictment for burning the storehouse. The burning of the storehouse and the stock of goods was one and the same fire. Under

these facts, this evidence was just as competent as if the pleas of guilty had been to the indictment for the burning of the goods. Under the facts of this case, to hold otherwise would be a construction too strained and unreasonable, too captious and technical.

To convict this appellant, the state was compelled to show that the fire was of an incendiary origin, and that Williams, Tennery, and Joe Osborne, or one of them, were the guilty parties. It is true the state had shown this fact by Joe Williams while on the stand; but the state was not confined alone to the testimony of Williams. Bear in mind the evidence to show these pleas of guilty was not competent for the purpose of proving that the intent was to defraud the insurance company, nor was it competent to show that the appellant, Osborne, had any guilty connection whatever with Joe Osborne, R. E. Tennery, and Joe Williams in the unlawful burning. The plea of guilty was properly admitted. In our own state it was held, in the case of *Keithler v. State*, 10 Smedes & M. 193, that "on the trial of a prisoner, indicted as an accessory to murder, the record of the conviction of the principal is evidence to prove that conviction, and all its legal consequences, though not evidence of the fact of the guilt of the prisoner." This same question is decided in the case of *Lynes v. State*, 36 Miss. 617. Upon the same point we find, in 2 Wigmore on Evidence, sec. 1079: "That a confession of a principal is admissible, on the trial of the accessory, to evidence the commission of the crime by the principal, seems clear on principle, supposing some evidence of the defendant's co-operation to be first furnished. But whether the judgment of conviction of the principal is receivable for the same purpose depends on the doctrine of the effect of judgments."

It is further insisted that, under section 1026 of the Code of 1906, it was not necessary to show the conviction of Tennery and Osborne in order to convict the appel-

lant. Section 1026 reads as follows: "Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal and shall be indicted and punished as such; and this whether the principal has been previously convicted or not." If we catch the idea of counsel, the section does not bear the interpretation put upon it by him. It was simply intended to charge all accessories to any felony before the fact as principals. Nevertheless, where several are indicted jointly for a felony, if the evidence shows that one or more were accessories before the fact, though charged in the indictment as principals, it is absolutely necessary to prove the party guilty who actually committed the felony before you can secure proof of the guilt of the accessories before the fact, though charged in the indictment as principals, by virtue of section 1026, Code of 1906. It is true that under this section the accessory can be tried and punished as a principal, before or after the principal has been tried.

With great zeal counsel for appellant contends that "there was no evidence of a conspiracy, other than the declarations of the co-conspirators themselves, and that these declarations were not admissible until the state had introduced other proof sufficient to establish a conspiracy." In the consideration of this question, it is well to keep in mind, as we have said heretofore, that before the declaration of one party can be received in evidence against another, in a criminal prosecution, there must be proof of a conspiracy *aliunde*. "But it is quite as well settled that a conspiracy may be proved, like other controverted facts, by the acts of parties or by circumstances, as well as their agreement." *Street v. State*, 43 Miss. 2.

We have considered this record thoroughly, and it is manifest to us that the court did not admit any of the declarations of the co-conspirators until the conspiracy had been proven. Taking Joe Williams' testimony, and

construing it in the light of all the facts and circumstances contained in this record, especially considering the facts and circumstances surrounding this fire and the conduct of the appellant, both before and after the fire, one is driven to the conclusion that they are absolutely inconsistent with any possible explanation, except upon the theory that he had conspired with Joe Osborne, Joe Williams, and R. E. Tennery to burn the building and stock of goods, with a view of defrauding the insurance company. There are many and various criminalizing circumstances in evidence in this case to point with almost absolute certainty that the attempt to defraud the insurance company was a well-planned and premeditated scheme on the part of appellant. The jury believed him guilty and doubtless they further believed that he was the master hand that inspired, directed, and planned the whole thing, and was in truth and in reality "the power behind the throne."

We think that this suggestion of error should be overruled. In the preparation of this opinion, we have been greatly aided by the able brief filed in this cause by the learned assistant attorney-general, Mr. Carl Fox.

Overruled.

PER CURIAM. The above opinion is adopted as the opinion of the court on the suggestion of error; and, for the reasons therein indicated, the suggestion of error is overruled.

S. D. ALEXANDER v. L. W. HERRING, ADMINISTRATOR.

[55 South. 380.]

1. EXECUTORS AND ADMINISTRATORS. *Powers. Code 1906, sections 2057 and 2058.*

An administrator is a statutory trustee whose duties and powers are fixed by law and cannot be enlarged by a decree of a court of chancery.

2. ADMINISTRATION. *Powers and duties.*

A chancery court cannot authorize an administrator to engage in business with the funds of the estate.

3. SAME.

The duty of an administrator consists in protecting the estate, winding up its affairs, collecting its assets and paying its debts and finally turning over to the court the net estate for distribution to those entitled to it.

Sections 2057 and 2058, Code 1906, expressly authorize the administrator to deal with growing crops and to cultivate or rent farm land, but an administrator under these sections is not authorized to buy timber and operate a sawmill and it is beyond the power of the chancery court to empower him to do so.

4. SAME.

In the absence of a statute authorizing it, an administrator has no authority to incur debts, binding on the estate, except for incidental expenses in due course of the administration of the estate.

5. VOID DECREE. *How attacked.*

A void decree of the court may be attacked anywhere either collaterally or directly.

APPEAL from the circuit court of Carroll county.

HON. G. A. McLAIN, Judge.

Suit by S. D. Alexander against L. W. Herring, administrator of the estate of C. M. Vaiden, deceased. From a judgment sustaining a demurrer to plaintiff's declaration, he appeals.

Brief for appellant.

[99 Miss.]

The facts are as follows:

This is a suit by appellant against appellee, administrator of the estate of C. M. Vaiden, for damages for breach of contract entered into between appellant and appellee, whereby appellant was to operate a sawmill on the estate of said decedent. The contract was to begin February 1, 1909, and end January 1, 1910. On June 1, 1909, appellee paid all amounts due to date and refused to carry out the contract, on the ground that it was not binding. The appellant exhibits an order of the chancery court empowering appellee to operate the sawmill belonging to the estate of the decedent, and to buy and pay for certain timber. The administrator demurred, on the ground that the order of the chancellor was *ultra vires* and void, and conferred no authority upon him to create a charge against the estate of the decedent. The demurrer was sustained, and, plaintiff declining to amend, judgment was entered against him, from which comes this appeal.

Hill & Coleman, for appellant.

This is an appeal from a judgment of the circuit court sustaining a demurrer to plaintiff's declaration.

There are many grounds of demurrer. In fact the demurrer resembles a bill in chancery, but the grounds relied upon in the court below, and I presume the grounds that will be relied upon here, were the third and fourth grounds of demurrer which are substantially that the order of the chancery court allowing L. W. Herring, administrator, to make the contract sued on is void, and fourth, that the declaration does not set forth that the chancery court had jurisdiction to render such order.

As to the question of jurisdiction it is not an open one in this state, and it is not necessary to allege jurisdiction of the facts of a court possessing general jurisdiction under the Constitution and this question is settled in 72 Miss. Rep. 760. The contention that the order is

void cannot be sound. The court examined into the matter and discovered from proof that it was the best interests of the minors for their guardian, W. L. Herring, to sell the timber on the land they own, and that the proceeds be used for the education and maintenance of the minors. Therefore it was ordered that L. W. Herring was to sell the timber on certain lands belonging to his wards at not less than fifty cents per one thousand feet on the stump and to render an account of the same to this court, and that the proceeds of the said sale were to be used advantageously for the estate of the said wards.

It appears that L. W. Herring was also administrator of the estate of C. M. Vaiden, deceased, and the order of the court provided how the proceeds were to be applied by L. W. Herring, both as guardian and as administrator. Certainly that was not a void order.

It was sought by the defendant and obtained by him and he undertook to carry it out and made a contract with the plaintiff in this case and the plaintiff in this case alleges a breach of his contract and sues for the damages resulting therefrom, and in the declaration did not allege that the chancery court of the second district of Carroll county had jurisdiction of the estates of minors, nor allege any facts showing said jurisdiction. Because the chancery court of Carroll county is a court of general jurisdiction, and has control of all minor's business, and all matters of administration, and under the authority cited, and several others, it is unnecessary to make any such allegations.

McLaurin, Armistead & Brien, for appellee.

We insist that the demurrer in this case was well taken and that the lower court acted properly in sustaining this demurrer. The declaration unquestionably states no cause of action for the reason that this order of the chancery court authorizing the administrator, appellee, to

make the contract sued on is void; and if the administrator, appellee, had no right to make such a contract, the contract is void and the order of the chancery court attempting to confer the power upon the administrator is likewise void. We insist that the chancery court had no jurisdiction whatever to authorize any administrator to operate a sawmill on the land of a decedent, and to incur expenses of employees in a mere speculative venture. No authority of law that we have been able to find confers upon the chancery court any such jurisdiction. We therefore say that the grounds of the demurrer are unquestionably well taken. The lower court took this view on the ground that there was no authority of law for the administrator to make any such contract and that no such authority could be conferred upon him by the chancery court, and therefore the estate which the administrator represented, the minors, who were the heirs of the land, could not be made to pay a judgment rendered on such contract. The court will observe that in said order of the chancery court referred to, the language is used that said timber is to be paid for at a sum not greater than fifty cents per thousand feet on stump where cut; showing that this timber was a part of the realty with which the administrator has nothing in the world to do ordinarily; that standing timber upon land is a part of the land we suppose appellant will not deny, and this being so, we contend that an administrator, such as is shown in this case, exercising the ordinary powers of an administrator, has nothing in the world to do with the real estate of the decedent except to sell it to pay debts and that the chancery court has no right to authorize any administrator to sell real estate of the decedent except to pay debts. This principle has been so fully established that it hardly needs the citation of authority.

“An administrator has nothing to do with the land of an estate except under an order to sell to pay debts.” *Herring v. Harris*, 45 Miss. 62.

"At common law lands descended were not assets. It is only by statute that they become assets and may be subjected to debts." *McPike v. Wells*, 54 Miss. 136, 149.

Lands descended directly to the heirs of the deceased. When a necessity arises to deal with it as assets they must have notice. *McPike v. Wells*, 54 Miss. 148, 149; *Gordon v. James*, 86 Miss. 719, 751.

"An administrator has no authority to incur debts which will be obligatory on the estate he represents except the incidental charges in due course of administration." *Farley et al. v. Hord et al.*, 45 Miss. 96; *Hollman v. Bennett*, 44 Miss. 322, 332.

In the last cited case, in the concluding part of the Opinion on page 332, the court said: "And are inclined to the opinion (not necessary however, to be decided in this case) that the probate court has no authority to license the sale of lands except to pay the debts of the intestate; that the expenses of administering the personal estate is not such debt within the terms of the statute."

Our statute charging lands of a decedent with debts means those debts contracted by the deceased, and not those of the representative in administering the estate. *Moore v. Ware*, 51 Miss. 206; *Allen v. Pool*, 54 Miss. 323.

We say, therefore, that the common law as held in the case cited in 44th Miss., *supra*, prevails in this state, being changed only by statute; and as the lands of a decedent were not assets at common law, they are only made assets by statute, and if the statute cannot be pointed to, authorizing the sale of a decedent's land, then any attempted sale of the decedent's land, even by a chancery court, is void as being without authority of law. When the court looks at this order of the chancery court, you will find that here is an order directing the administrator to operate a sawmill belonging to the estate of the decedent. No authority of law that we have been able

to find authorizes the administrator to do any such thing, nor have we been able to find any authority of law which would empower the chancery court to confer any such authority upon an administrator as operating a saw-mill.

The court will observe from this order, also, that L. W. Herring, administrator and appellee, is authorized by the chancery court to purchase from himself as guardian of the minor heirs of the decedent, the hardwood timber on the land of the heirs and to pay fifty cents per thousand feet on the stump when cut, and to operate said sawmill belonging to said estate of C. M. Vaiden, deceased. In other words, we have in this order a strange condition presented of a trustee being directed to buy from himself. L. W. Herring, administrator, is authorized to buy from L. W. Herring, guardian of these wards, this timber and with the timber to operate a sawmill on the idea that this would be for the benefit of all concerned.

As held by Judge Simrall in *Farley et al. v. Hord et al.*, 45 Miss., *supra*, on page 104, the administrator is styled a "statutory trustee," invested with naked power, uncoupled with interest, and must be confined directly within the terms of the statute; and on page 101 at bottom of page, and page 102, of the same case, in the same opinion, Judge Simrall lays down the law as follows:

"Have the complainants an equity to sell the lands? It is not controverted by the counsel for the respective parties that under the general law, an administrator has no authority to incur or create debts which will be obligatory on the estate he represents, except the incidental charges in the due course of administration. A summary of his duty is found in the oath of office. He must, as soon as convenient, pay off the debts and distribute the surplus. The general tenor of the law does not encourage the idea that he can hold the property together and out of its income, through a series of years, realize money

to pay off the debts; nor can he borrow money in anticipation of income; nor can he keep it together on the theory and with a view of making profit for distributees; nor can he intermeddle with the lands which have descended to the heir, except in special circumstances."

This being the law, we insist that any order of the chancery court which undertook to authorize an administrator to operate a sawmill indefinitely on the idea of making money for the distributees, is specially condemned by this authority, and such an order is void; and if the chancery court's order is void, necessarily the contract sued on is void, because if the administrator had no right to make the contract, the contract is void, and no recovery can be had thereon.

MAYES, C. J., delivered the opinion of the court.

The trial court properly sustained the demurrer and dismissed the declaration. If any liability exists under the contract sued on, it is the liability of L. W. Herring, individually and personally, and not a liability of the estate which he represents as administrator.

An administrator is a statutory trustee, whose duties and powers are fixed by law. These duties and powers cannot be enlarged by a decree of the chancery court, and, if the chancery court by its decree undertakes to confer upon an administrator powers which are denied under the law, the decree of the court is a nullity.

A chancery court can no more authorize an administrator to engage in business with the funds of the estate than it can make a decree declaring that the funds of the estate shall be the property of the administrator. In either case the decree goes clear beyond the powers of the court, and beyond the legal right or duty or purpose of an administrator, and such decree is a nullity.

One of the things which an administrator cannot do, in the absence of a statute authorizing it, is to engage in business of any kind. The duty of an administrator

consists in protecting the estate, winding up its affairs, collecting its assets, and paying its debts, and finally turning over to the court the net estate, for the purpose of having it distributed to those entitled to it. The heirs are not to have their property hazarded by allowing the administrator to venture it in business, however honest may be the purpose of the administrator or bright the prospect. In winding up a decedent's business, some discretion is allowed an administrator in a proper case; but it must be allowed in winding up, and not allowing the administrator to engage in a wholly new and independent business.

Sections 2057 and 2058, Code of 1906, expressly authorize the administrator to deal with growing crops and to cultivate or rent farm land. But, whatever powers an administrator may ordinarily have, a discussion of them is not involved in this case, because it is clear that the contract authorized by the chancery court to be made by the administrator was beyond the power of the court, or of the administrator, and is a nullity. The decree of the court authorized the administrator to buy hardwood timber and operate a sawmill; in other words, to engage in a milling business. The contract derives no sanctity from the fact the court authorized it, because it was beyond the power of the chancery court. In the case of *Farley v. Hord*, 45 Miss. 6, this court expressly held that, in the absence of a statute authorizing it, an administrator has no authority to incur debts binding on the estate, except for incidental expenses in due course of the administration of the estate. The decree of the court being void, it may be attacked anywhere, either collaterally or directly, and is no more than if such decree had never been rendered.

Affirmed.

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1911.

JOHN T. CARTER v. STATE.

[54 South. 734.]

1. **CRIMINAL LAW.** *Proceeding before grand jury. Presence of stenographer.*

Where a cause was under investigation by the grand jury, the district attorney had the testimony taken down by a stenographer introduced by him into the grand jury room for that purpose and all the stenographer did while in the grand jury room was to take down the evidence and this evidence was not discussed or commented upon in his presence by any member of the grand jury. *Held*, that this was not reversible error as the accused could not be prejudiced thereby.

2. **SAME.**

Unless the court can say that a defendant was not prejudiced by the presence of an unauthorized party in the grand jury room the case will be reversed.

3. **TRIAL.** *Excluding the public. Constitution, section 26.*

The discretion vested in the court by the Constitution, section 26, to exclude the public from a criminal trial is in the interest of

Opinion of the court.

[99 Miss.]

the public morals, and whether it is exercised or not is a matter in which the defendant has no concern.

4. HOMICIDE. *Admission of evidence. Harmless error.*

In a prosecution for murder wherein defendant was convicted of manslaughter, testimony tending to show neglect by the defendant of his wife under the facts of this case was harmless error.

5. CROSS-EXAMINATION OF ACCUSED. *Harmless error.*

Where the defendant on cross-examination was asked by counsel for the state, if his wife would testify and also whether he would object to his wife being introduced as a witness for the state, and both these questions were objected to and the objection sustained by the court, *held*, that while these questions were highly improper and should not have been asked, it was not reversible error.

6. MURDER. *Manslaughter. Instructions.*

Where a defendant charged with murder is convicted of manslaughter he is presumed not to have been prejudiced by any instructions relating to the crime of murder.

APPEAL from the circuit court of Monroe county.

HON. JNO. H. MITCHELL, Judge.

John T. Carter was charged with murder and convicted of manslaughter and appeals.

The facts are fully stated in the opinion of the court.

Geo. T. Mitchell and *E. O. Sykes, Sr.*, for appellant.

R. N. Miller and *Jas. R. McDowell*, assistant attorney-general, for state.

No brief of either counsel found in the record.

Argued orally by *E. O. Sykes* and *Geo. T. Mitchell*, for appellant and *R. N. Miller* and *Jas. R. McDowell*, assistant attorney-general, for state.

SMITH, J., delivered the opinion of the court.

Appellant was indicted for murder, convicted of manslaughter, and appeals to this court.

When this cause was under investigation by the grand jury, the district attorney had the evidence taken down by a stenographer, introduced by him into the grand jury room for that purpose. A motion to quash, setting up this fact, was filed by the appellant, and by the court overruled. The stenographer's notes were transcribed, and the district attorney and private counsel, employed to assist him, were each given a copy thereof; but, acting upon the instruction of the district attorney, the stenographer declined to give a copy to counsel for appellant. All that this stenographer did, while in the grand jury room, was to take down the evidence, and this evidence was not discussed or commented upon in his presence by any member of the grand jury.

The introduction of this stenographer into the grand jury room was without authority of law; but, since it is manifest that appellant could not have been prejudiced thereby, he cannot be heard to complain thereof. In all of the cases wherein this court has reversed the judgment of the lower court overruling motions of this character, it appeared that the unauthorized person was introduced into the grand jury room for the purpose of aiding, in some way, in procuring the finding of the bill of indictment. It is to be hoped, however, that prosecuting attorneys will abstain from indulging in experiments of this character; for cases may easily arise wherein the court cannot say that the defendant could not have been prejudiced thereby; and, unless the court can so say, the indictment must be quashed, for in that event the court will not inquire into whether or not the defendant was in fact prejudiced.

Before entering upon the trial, appellant requested the court to clear the courtroom of all persons, except court officials, jurors, parties, and witnesses, etc., as provided in section 26 of our state Constitution, which request was by the court denied. The discretion vested in the court by this section of the Constitution is in the interest of public morals. It abridges, instead of enlarging, a de-

fendant's rights, and whether it is exercised or not is a matter with which he had no concern. Moreover, murder is not one of the crimes enumerated in this section. The request, therefore, was properly denied.

The admission of testimony introduced by the state over appellant's objection, tending to show neglect by him of his wife, may have been error, as to which we express no opinion; but in view of all the evidence in the case, and the verdict rendered, it is hardly probable that it had any influence whatever upon the jury in arriving at their verdict. Granting this action of the court to have been erroneous, it is not such an error as necessitates a reversal.

Appellant, who testified in his own behalf, was on cross-examination asked, by counsel for the state, if his (appellant's) wife would testify, and also whether he would object to his wife being introduced as a witness for the state. Both of these questions were objected to, and the objections sustained by the court. Appellant contends that asking these questions constituted a comment on the failure of his wife to testify, and that consequently he is entitled to a reversal. These questions were highly improper, and should not have been asked, but so doing does not constitute reversible error. *Finklea v. State*, 94 Miss. 780, 48 South. 1.

Appellant insists most earnestly that the court erred in granting instructions asked by the state. We are relieved from any consideration of the instructions relating to the crime of murder, for the reason that appellant was convicted of manslaughter, and is, therefore, presumed not to have been prejudiced by any instructions relating to the crime of murder. The court may have erred in granting other instructions asked by the state; but a careful review of the whole record convinces us that such errors, if errors in fact there be, could not have prejudiced appellant.

We find no reversible error in the other matters complained of.

Affirmed.

99 Miss.]

Statement of the case.

BARTON J. ROBINSON v. MAYOR AND ALDERMEN OF CITY OF VICKSBURG.

[54 South. 858.]

1. EMINENT DOMAIN. *Damages. Estoppel. Constitution 1890, section 17.*

The owner of property is not estopped to claim damages resulting in the change of grade of a street, because he signed a petition to the mayor and board of aldermen asking that the street be paved.

2. SAME.

Constitution 1890, section 17, provides "that property shall not be taken or damaged for public use, except on due compensation being first made to the owner thereof," and this constitutional right is not waived by the owner signing a petition for the paving of a street where there is no express waiver in the petition of the right to claim damages.

3. PEREMPTORY INSTRUCTION. *Jury.*

Where there is no issue of fact for the jury to try as to defendant's liability for damage the court should give a peremptory instruction for plaintiff as to liability.

4. PREJUDICIAL ERROR. *Instructions.*

In a suit by an abutting property owner against a city for damages to his property caused by a change in the grade of a street where the liability of the city was unquestioned, it was prejudicial error to admit in evidence a petition, signed by plaintiff for the paving of the street in question and to refuse to instruct the jury to find for the plaintiff on the question of liability.

5. SAME.

Such erroneous action of the court was calculated to cause the jury in determining both the question of liability and the quantity of damages to render a compromise verdict as to the latter.

APPEAL from circuit court of Warren county.

HON. H. C. MOUNGER, Judge.

Suit by Barton J. Robinson against the City of Vicksburg. From a judgment for plaintiff he appeals and the city prosecutes a cross appeal.

The facts are fully stated in the opinion of the court.

Brunini & Hirsch, for appellant.

The court refused appellant instruction No. 13 directing the jury to find for the plaintiff, and submitted the question of liability to the jury. We submit that this was error under the facts in this case. There was no conflict in the testimony with reference to the raise of the grade of the street, and there was no testimony in conflict with the appellant's testimony that his property had been damaged.

Appellant was therefore, entitled to have the court instruct the jury to find for him.

The court refused appellant's instruction No. 11. It was extremely important that the appellant should have an instruction which defined the grade of the street, for the reason that there was testimony to the effect that there were washes in the street; that the street sloped from one side to the other, etc., and especially in view of the fact that instructions Nos. 4 and 5 for the appellee were given to the jury.

Instruction No. 11 is almost in the exact words of the language of this court in the case of *City of Jackson v. Williams*, 2 Miss. 319.

The lower court erred in admitting over the protest of appellant, the fact that plaintiff had signed the petition requesting the appellee to pave Mulberry street; in likewise admitting the petition so signed; in likewise admitting article 25, of section 28, of the city charter; in likewise admitting the ordinance of the city, providing for the pavement.

At the conclusion of the testimony in the case, the appellant again moved the court to exclude the petition for the paving of Mulberry street, and also the ordinance passed thereon by appellee. The court denied the motion.

In other words: The court permitted the jury to consider the fact that appellant had signed the petition to pave the street; the ordinance adopted thereon, and the

charter with reference thereto. Appellee offered this testimony as a complete defense to the action of appellant.

Appellant asked the court to give it instruction No. 12, which told the jury that it should disregard the fact that appellant signed the petition requesting the appellee to pave Mulberry street in front of plaintiff's property; and the defendant asked the court to give its instruction No. 3, which announces the opposite view of the law. The lower court responded to the requests of appellant and appellee, that he wanted to be fair about the matter, and would give both instructions. The attention of the court was immediately called to the fact that these two instructions were directly in conflict with one another, and the court then remarked that he would give neither one of them, and adhered to this ruling.

So the case went to the jury, neither upon the theory of the appellant, nor that of the appellee. The jury, however, were permitted, by the ruling of the court to consider the fact that appellant had signed the petition, and they were left to determine what effect the signing of the petition by the appellant should have by way of defense.

To pave a street with brick or other modern paving material, where the grade of the street is not to be changed, the surface of the grade of the street must be excavated to the thickness of the depth of the material and foundation. First goes a six-inch foundation of cement concrete; then a cushion of sand one and one-half inches in thickness, and upon the sand cushion are placed the material, in this instance, brick on edge.

All that is said with reference to the grade in the charter provision and the petition is:

"The cost of the grading of such work, and paving of the intersections, together with one-third of the cost of the remainder of the work to be borne by the city."

Now, nothing is said about changing the grade. What is understood by grading a street? Simply to bring it to grade; to bring it to the surface or to grade line.

"The ordinary meaning of the term 'grade' is the amount or difference between the 'grade line' and the level or horizontal line, and to grade a street is to bring the surface of the street to grade line. The term includes excavation and filling, so as to make the surface conform to the grade line." *Davee v. Saginaw* (Mich.), 32 N. W. 919.

In grading a street or roadway, where no change in the grade is to be made, it is always necessary to fill in the ruts or washes, or other uneven places. This is unquestionably included in the term "grade."

"Particular complaint is made that there was no evidence that the original grade of the street was 'well settled,' whereas, the surface was so uneven as to constitute no grade at all. The description of its character given by these words is quite immaterial. The term 'grade' is used in the statute, not to signify a level precisely established by mathematical points and lines, but the surface of the highways as it in fact exists. Any elevation or depression of this surface by the municipal authorities, resulting from an attempt to establish a grade, is a change of grade, which if damages result, will support an action. There is no error. The other judges concurred." *McGar v. Borough of Bristol* (Conn.), 42 Atl. Rep. 1002.

As a future step in the argument, we wish to call the court's attention to the fact that the testimony of appellant almost demonstrated, if it did not demonstrate, that his damages were in the neighborhood of three thousand dollars. The testimony was there that changes were necessary to be made in order to conduct his business in his shop; that the second story of the building could not be used for the purpose for which it was designed without change; that in making the change, his

machines, etc., had to be elevated, and that he had already gone to some temporary expense in protecting his building from the fill, etc. There was no testimony to the effect that the changes would not have to be made, nor was there any conflict as to the cost of the changes made necessary by the raise of the grade in front of appellant's property.

We contend most earnestly, that if the court had given instruction 13, directing the jury to find for the appellant, that appellant would have recovered at least three times as much damages as he did; and that even though the court had refused to instruct for appellant, and had excluded the petition for paving, that the verdict for appellant would have been over three times as large.

We are aware of the fact that by rendering the verdict in favor of the appellant, that the jury necessarily found the question of liability in favor of appellant, but we refuse to shut our eyes to the fact that the verdict was cut down by reason of the admission of the petition for the payment, which appellant signed, or by reason of the fact that the court refused to instruct peremptorily for the appellant.

We dare say that there is not a lawyer practicing at the bar in the state of Mississippi, who has had any court experience whatever, who does not know it to be an indisputable fact that a jury will not first determine the question of liability and then determine the question of damages. They will, invariably, consider both, and where the liability is not clear, or there is a controversy over it, they will cut down the verdict.

Anderson & Voller, for appellee.

We think that the mere statement of the proposition that appellant, by signing the petition under the circumstances indicated, is estopped to claim the damages demanded, is sufficient, even without citing authorities. However, we will not content ourselves with that, and

now call the court's attention to the propositions of law relied on to support our contention.

The Missouri court, as far back as Nov. 15th, 1886, announced the doctrine as follows:

"A property owner, who has consented to the change of grade of a street, by joining in a petition to the city council to have such change made, is equitably estopped from setting up any claim for damages resulting from such change."

And this is so, even though "the petition was not signed by property holders owning a majority of front feet of property fronting on the part of the street to be improved." *Cross v. City of Kansas*, 1 S. W. Rep. 749.

The court in this case cites with approval and quotes from the case of *City of Burlington v. Gilbert*, 31 Ia. 357, at p. 367.

The Texas court on April 4th, 1894, announced the same doctrine on the following statement of facts:

"Upon an examination of the evidence contained in the statement of facts, we find that it was proven without controversy that prior to the construction and establishment of the grade upon Maple street, plaintiff, joining with a large number of others owning property abutting upon said street, petitioned the council of the city of Texarkana, in writing, to establish and construct a grade upon Maple street, presenting strong and urgent reasons for the prayer of the petitioners."

Damages resulted from the flow of water, and this suit was brought; thereupon the court used the following language:

"It would hardly be reasonable to give the law a construction which would authorize one to influence a city council by petition to fix and construct a grade upon a street, and then permit him to recover damages for injuries which are incident to the proper construction of such work. We think it would be more in harmony with good conscience and sound reason to treat such an act as

a consent to the construction of the grade, and a waiver of such damages as are incident to its proper construction. When the plaintiff signed and presented his petition to the city council praying for the fixing and construction of the grade upon Maple street, he consented, in the meaning of the Constitution, to all such damages as was incident to a proper and skillful construction thereof, and could only recover for injuries resulting from negligence of the city in constructing the work consented to by plaintiff." *City of Texarkana v. Talbot*, 26 S. W. 451, at p. 452. To the same effect is the case of *Collins v. Grand Rapids* (Mich.), 54 N. W. 889. See, also, 28 Cyc., pages 1086 and 1087, and notes.

But, we will be met with the suggestion that the petition under consideration in the instant case was not to change the grade, but to simply pave. We reply that in the charter and the petition, both paving and grading are contemplated. However, we will go a step further. The Missouri court on May 30th, 1893, announced this doctrine:

"Landowners who petition for the establishment of the proper grade of a street, and for the paving of the same, and sue the city for damages for a change of grade, although they were assured that there would be no cut, the board of aldermen being unaware of such representation." *Vaile v. City of Independence*, 22 S. W. 695, 28 Cyc., *supra*.

The Washington court on October 18th, 1894, in a case then before it. said:

"One who petitions a city to extend a street at the expense of the owners of the land fronting thereon, will be estopped from claiming damages for land taken or accruing to the land adjacent thereto by reason of cutting down the street."

And further: "A city petitioned to grade a street is authorized to establish a reasonable grade." *Ball v. City of Tacoma*, 38 Pac. 133.

The court's attention is again called to the fact that the city had no power to pave Mulberry street at the expense of abutting property on its own motion or initiative, but that in order for the paving to be done, it was necessary that this petition should be presented asking that such paving be done; that in the petition itself, as well as the charter provision under which it was gotten up and presented, it is specifically stated that the city shall pay for the grading that may be necessary to be done, for the paving of the street intersections, and for one-third of the balance of the work, and that the property owners are required simply to pay the other two-thirds; that is to say, that each property owner pays one-third of the balance of the paving which is done in front of and abutting his piece of property.

Just here we call the court's attention to the testimony of appellant himself, showing what he paid for this paving and what the city had to pay. It will be seen that it was in the contemplation of the petitioners themselves that some grading must be done in order that the street might be properly paved. The fact that it was not known to petitioners just what and how much might be necessary for that purpose, can possibly make no difference, and that unless the grading done was unnecessary or was negligently and improperly done, the property owner is estopped to claim any damages that might flow to him therefrom.

Another fact we desire again to mention, is that the record shows that there had never been an official grade on Mulberry street established. The court goes on to say upon a similar proposition.

"Where a property owner, after the adoption of an ordinance fixing a grade different from that in conformity to which he has improved his property, signs a petition for improvements to the street, he will be estopped from claiming damages resulting from improvements made on the last established grade." *Preston v. Cedar Rapids*,

63 N. W. 577. Discussion of the facts on this case, found on pages 579 and 580, are interesting and instructive. The authorities, however, have gone even further than those already cited.

The Missouri court of appeals announces this doctrine:

"Where one signed a petition requesting the construction of a bridge, knowing that, in order to reach the bridge, certain approaches would have to be erected, which would raise the surface of the street in front of his premises, he was held estopped." *Justice v. Lancaster*, 20 Mo. App. 559.

By examining the record it will be seen that it was impossible to properly pave this street without bringing the west side up to the approximate level of the east side thereof.

It will be further seen from the testimony of witness, that for the very purpose of saving appellant's property from damage the east side of the street was cut as low as it was possible to do so, and conserve the proper conditions of other streets, and the west side was raised only to such a height that would possibly meet the requirements of the case. The west side was then left more than a foot lower than the east side, but it was thought that they could get along with the street in that condition.

The courts have applied the doctrine herein contended for in cases of streets occupied by street railroads. The rule is expressed about as follows:

"The cases are substantially agreed that the express consent, whether evidenced by writing or shown by parol, by the owner of abutting property, to the construction of a railroad in a street or highway, the fee of which is not owned by him, is irrevocable, at least after it has been acted upon." *Wolfard v. Fisher*, 7 L. R. A. (N. S.) 991, and note.

See, also, *Smyth v. Brooklyn U. Elev. R. Co.* (N. Y.), 23 L. R. A. (N. S.) 443, and note.

It will be observed that in the quotation made above, mention was made of the fact that the abutting owner did not own the fee in the street. The record in the instant case does not show who owns the fee to Mulberry street, and the presumption must be indulged of course in that state of case, that it is owned by the city. But, we submit that, as shown by the New York case last above cited, it makes no difference about the ownership of the fee, when the work is done with the written consent or upon the written petition of the property owner, as in the case at bar. If we are correct in the position taken that this petition estopped appellant from claiming damage, then the court erred in not granting us our peremptory instruction, and also erred in refusing the other instructions asked for by us, and in giving plaintiff the instructions asked for by him. We think, therefore, that this disposes of the whole case, and we submit that the case should be affirmed on appeal and reversed upon cross appeal.

ANDERSON, J., delivered the opinion of the court.

The appellant, Robinson, sued the appellee, city of Vicksburg, for damages alleged to have been done his lot and building on Mulberry street, in said city, by the appellee, in raising the grade of said street on the side next to said lot, and recovered judgment for eight hundred and sixty-six dollars and sixty-five cents, from which he prosecutes this appeal, and the appellee a cross-appeal.

The appellant bought his lot on Mulberry and Clay streets in 1901, on which he soon thereafter constructed a machine shop, and which he continued to use and operate up to the time of the bringing of this suit. His building was constructed with reference to the grade of Mulberry street as it then existed and had existed for many years, and which continued until the injury complained of, which occurred in 1908. The appellee's charter provides that on the petition of a majority of the

owners of the greater number of lots or parts of lots, or of the owners of the greater number of lineal feet, fronting on any street or alley, the mayor and board of aldermen may pave such street or alley; the city paying the cost of grading and paving the street intersections, together with one-third of the cost of the work, the remaining cost to be paid by the abutting property owners. In 1908 a majority of the owners of lots and parts of lots, who were also owners of the greater number of lineal feet, fronting on Mulberry street, between Grove and Depot streets, petitioned the mayor and board of aldermen to pave that part of Mulberry street. Among the abutting owners who signed said petition was the appellant. Such petition was presented to the mayor and board of aldermen, who thereupon passed an ordinance providing for the paving of Mulberry street as prayed for. The petition of the abutting owners is silent as to the grade on which the paving was to be done. The ordinance, however, adopted in pursuance of the petition, provided that the paving should be done "on the grade now fixed and established." No grade had ever been in fact established by formal act of the municipal authorities. For many years it had stood as it was when changed in 1908. At the time this ordinance was adopted no grade was fixed, nor was there afterwards, by any record entry or order. Mulberry street, between Grove and Depot streets, slopes from east to west, and, before graded and paved in pursuance of this ordinance, was five and one-fifth feet lower on the west than on the east side at the point where it abutted appellant's lot. When his building was constructed, its floor was slightly elevated above the west curb of Mulberry street. In grading and paving the street under this ordinance, the west curb adjoining appellant's property was raised three and one-fifth feet, which appellant claims damaged his lot and building.

The appellee contends that the appellant is estopped to claim damages resulting in the change of the grade of the street, because he signed the petition to the mayor and board of aldermen asking that the street be paved. In 11 Am. & Eng. Ency. of Law (2d Ed.), p. 387, "estoppel" is thus defined: "An estoppel may be defined in a general sense to be a preclusion of a person to assert a fact which has been admitted or determined under circumstances of solemnity, such as by matter of record or by deed, or which he has by an act in pais induced another to believe and act upon to his prejudice." Section 17 of the Constitution of 1890 provides that: "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof," etc. The petition signed by the appellant contained no express waiver. May a waiver be implied from a mere signing of the petition by him? Or may a waiver be implied by his signing the petition with the knowledge that in paving the street the city might find it necessary to change its grade? We think not. In our judgment such conduct ought not to operate as an estoppel. A constitutional right may not be so lightly waived. There is nothing whatever in the petition, nor in the conduct of the appellant as disclosed by the record, which evidenced a purpose on his part to waive his constitutional right to claim damages to his property, caused by raising the grade of the street. Nor is there any evidence tending to show that the city, in passing the ordinance providing for paving the street, was led by the appellant to believe that he would not claim his right to damages for an injury thereby done him.

We approve the language of the supreme court of Alabama, in passing on this identical question, in the case of *Decatur v. Scharfenberg*, 147 Ala. 367, 41 South. 1025, 119 Am. St. Rep. 81, as follows: "We are not of opinion that the petition merely to pave the avenue would be a

waiver of damages growing out of the change in the grade of the highway, as set forth in the bill. Such waiver of a constitutional right ought not to be lightly inferred, and cannot be clearly derived from the request to pave the avenue and the agreement to bear a part of the expenses of the paving. *Newville Road case*, 8 Watts (Pa.) 172; *Barker v. City of Taunton*, 119 Mass. 392; *Birdseye v. City of Clyde*, 61 Ohio St. 27, 55 N. E. 169; *Jones v. Borough of Bangor*, 144 Pa. 638, 23 Atl. 252. As said by the supreme court of Massachusetts in *Barker v. City of Taunton*, 119 Mass. 392: 'It is no bar to the claim for damages made by the petitioner that he was one of the original petitioners for the improvement. That alone is not evidence of an assent that his property shall be taken for public use without compensation.' While the court uses the words 'taken for public use,' the facts of the case show that it was similar to the one before us, and that damages were claimed for injury to plaintiff's premises by lowering the grade in the construction of a sidewalk. There, also, the plaintiff had merely petitioned for the construction of the sidewalk.

To sustain its position appellee relies on *Texarkana v. Talbott*, 7 Tex. Civ. App. 202, 26 S. W. 451; *Collins v. Grand Rapids*, 95 Mich. 286, 54 N. W. 889; *Vaile v. City of Independence*, 116 Mo. 333, 22 S. W. 695; *Ball v. City of Tacoma*, 9 Wash. 592, 38 Pac. 133. It is held in those cases that an abutting owner who joins in a petition to the municipality to grade or change the grade of the street is estopped to claim damages to his property caused by such change of grade. That principle has no application to the facts of the case at bar. Here the petition did not ask for a change in the grade of the street, but only that the street be paved. Whether the principle declared in those cases is sound this court is not now called upon to decide. It follows that the court below erred in admitting in evidence the paving petition signed by the appellant.

There was no issue of fact for the jury to try as to appellee's liability for whatever damages appellant suffered by the grade of the street being raised. There is no conflict in the evidence on the question of liability. The facts are undisputed. Under the law the appellee is liable to the appellant for the damages done his property by raising the grade of the street. The court, therefore, erred in refusing to instruct the jury to find for the appellant on the question of liability, as requested in his behalf.

It is contended for appellee that, in view of the fact that the jury found in favor of the appellant on the question of liability, the latter is precluded from complaining of the error of the court in refusing to instruct the jury peremptorily on that question, and in admitting in evidence the paving petition signed by the appellant. This position would be well founded, if it were clear that such error did not prejudice the jury against the right of the appellant to damages. It cannot be said, however, that this is true. By submitting to the jury the issue of liability, along with the paving petition, which could have no other effect than as tending to influence the jury to believe the appellee had done appellant no injury, makes it clear that the jury was unduly hampered in determining the amount of damages appellant was entitled to. The sole question which ought to have been submitted to the jury was the amount of appellant's damages. The erroneous action of the court was calculated to cause the jury, in determining both the question of liability and the quantity of damages, to render a compromise verdict as to the latter. For example: Some of the members of the jury may have thought there was no liability, while others were of opinion there was liability, and appellant ought to have the amount of damages his testimony tended to prove, three thousand dollars, and to adjust this difference a compromise verdict as to the damages may have been the result. To say the least of

99 Miss.]

Statement of the case.

it, the error of the court was calculated to produce this result.

From these views, it follows that the case is reversed on direct and affirmed on cross-appeal and remanded.

Reversed and remanded on direct appeal.

Affirmed on cross-appeal.

SWINTON PERMENTER v. STATE.

[54 South. 949.]

CRIMINAL LAW. Circumstantial evidence. Instructions.

While it is true that a conviction may be had on circumstantial evidence alone, when by it guilt is proven beyond a reasonable doubt, it is equally true that it must exclude every other reasonable hypothesis than that of guilt.

APPEAL from the circuit court of Winston county.

HON. G. A. McLAIN, Judge.

Swinton Permenter was convicted of murder and appeals.

The facts are as follows:

The appellant was convicted of murder and sentenced to death. He is charged with murdering a young lady, Miss Sharp, a daughter of a neighbor. Appellant and Miss Sharp were near the same age, both minors, and were well acquainted; appellant being a frequent visitor to the Sharp home, and according to some of the evidence attentive to the young lady. One afternoon, shortly after dinner, the young lady left her home, going along the country road to a store, where she made a few purchases, and left there with the intention of going by a neighboring house to use the telephone. After leaving the store she was never seen alive again. About dark, when she had not put in an appearance at home, the neighbors

Brief for appellant.

[99 Miss.]

were aroused, and a search was instituted, in which all the neighbors joined. During the early part of the night the appellant was not seen with the searching party, and he became the object of suspicion. It seems from the record he was not looked upon with favor by the father of the young lady, and had been heard to remark that he would get even with the Sharps and other similar remarks. Later in the night he did join the searching party, and the search continued until daylight, when the body of the young lady was found in a ravine, a short distance from the road. Her skull had been crushed by a heavy instrument of some sort, and her throat had been cut. The crowd was kept back from the body, and during the day, about noon, hounds were put on the trail, and led the searching party to the home of appellant. A question is raised as to the value of the testimony of these hounds, because they were shown to be young, and because of the additional fact that it was at least twenty hours after the homicide before they were put upon the trail. The testimony was admitted, however, over the objection of appellant. In appellant's pocket was found a handkerchief, which was identified by the members of the young lady's family as being the one she carried with her the afternoon before. Appellant's brother says the handkerchief was found at a picnic. The evidence against appellant was entirely circumstantial. He did not testify in his own behalf, nor did his parents testify for him; but an alibi was sought to be proven by various parties who testified that they saw him about the time, or perhaps shortly before the time, the crime is supposed to have been committed. The trial resulted in a conviction, and an appeal is taken. Among other errors assigned is the giving of the instruction referred to in the opinion.

Watkins & Watkins, for appellant.

Instruction number 2 given for the state is fatally erroneous. It instructs the jury that they may convict

the defendant if circumstantial evidence generates full conviction in their mind beyond every reasonable doubt.

In the case of *Lipscomb v. State*, 75 Miss. 577, the court disapproved this language in an instruction, using the following language:

"Full conviction is not the criterion or degree of proof necessary to convict. It is a loose phrase. There is but one rule in law in this state as to the measure and sufficiency of proof which will warrant conviction. It is that the evidence must engender a certainty of belief beyond a reasonable doubt."

In other words, if the court please, the circumstances must be sufficiently strong not to engender full conviction beyond every reasonable doubt, but certainty of belief, excluding every other hypothesis than that of the guilt of the defendant.

An instruction similar to this one was given in *Gibson v. State*, 76 Miss. 137, but the instruction cured the error pointed out in *Lipscomb v. State*, and Judge Whitfield approves the instruction, because he says:

"It adds to the clause 'full conviction' the highest degree of moral certainty and to the exclusion of every reasonable doubt."

In other words, the instruction in the Gibson case informed the jury that circumstantial evidence should be weighed with great caution, and, in effect, that it must exclude every theory except that of the guilt of the defendant. Instruction number two for the state in this case does not do so.

The effect of the case of *Haywood v. State*, 90 Miss. 465, is to hold that a similar instruction to the one now under criticism was not good, because it did not inform the jury that a conviction could not rest on circumstantial evidence, unless every circumstance necessary to convict the defendant was shown beyond every reasonable doubt. The instruction in question is condemned by the Haywood case, because it substituted full conviction for

certainty of belief beyond every reasonable doubt, and because it failed to inform the jury that the belief of every necessary fact should be so strong as to exclude every other hypothesis.

In the case of *State v. Cohen*, 75 Am. St. Rep. 212, an instruction was held erroneous which authorized a jury to convict on circumstantial evidence unless the state shall prove, beyond every reasonable doubt every link necessary to establish the guilt of the accused.

In the case of *State v. Trial*, 53 S. E. 17, and in the case of *Schwantz v. State*, 106 N. W. 237, it is held that all the facts and circumstances necessary to convict the defendant must be proved to the same extent as if the whole issue had rested on the proof of each individual circumstance, in cases where it is sought to convict an accused on purely circumstantial evidence.

And we wish to call the attention of the court to the fact that instruction number two given by the state, which we are now criticising, was practically the same instruction condemned in *Haywood v. State*, 90 Miss. 467, except it eliminated the words that circumstantial evidence was as good as any other kind, and substituted there that it had been used in every age of the common law.

In the case of *State v. Johnson*, 103 N. W. 565, it is held that an instruction is erroneous which informs the jury that it need not be satisfied beyond all reasonable doubt as to each link in a chain of circumstances relied on to convict.

The same thing is held in the case of *State v. Young*, 82 N. W. 420.

An instruction is erroneous, it is said, in the case of *State v. Sassen*, 75 Mo. App. 197, which informs a jury that guilt may be established by circumstantial evidence unless the jury is also informed that evidence must be of sufficient strength to exclude to all moral certainty every other reasonable hypothesis.

The same is held in *Cunningham v. State*, 77 N. W. 60, and in *State v. Hudson*, 97 Am. St. Rep. 768.

We contend that the language used in instruction 2 that the circumstances should generate full conviction, was not a correct statement of the law; that the jury should have been instructed that the evidence should have been of sufficient strength to exclude every other hypothesis than that of the guilt of the defendant, and that beyond all reasonable doubt. In other words, that every fact necessary to make the state's chain should have been proved beyond every reasonable doubt, and it was not sufficient merely to generate full conviction from all the facts and circumstances even beyond every reasonable doubt.

The court excluded instruction number 4 asked for the appellant. This instruction was intended to inform the jury, and would have informed them, that circumstantial evidence should be weighed with great caution. It was refused and no other instruction like it was given, and the jury were not instructed upon that important point. The refusal of this instruction was erroneous. *Webb v. State*, 73 Miss. 461; *Pitts v. State*, 43 Miss. 486; *Nelms v. State*, 58 Miss. 362.

We do not know upon what theory this instruction was refused.

The court also refused instruction number 11 asked by the defendant. This instruction would have informed the jury that if there was any fact proven to their satisfaction which was inconsistent with the defendant's guilt, that this raised a reasonable doubt, and that they should acquit the defendant. This instruction was in keeping with well-settled law, that the state should make the evidence so strong as to exclude every hypothesis or every theory other than that of the guilt of the defendant. Therefore, if there was single fact proven and which the jury believed to be a fact, which was inconsistent with

the defendant's guilt, why that raised a reasonable doubt, and the defendant should have been acquitted.

In the case of *Bowen v. State*, 37 So. 233, it is held that the test of the sufficiency of circumstantial evidence in a criminal case is whether the circumstances as proven are capable of explanation upon any reasonable hypothesis consistent with the defendant's innocence, and if they are capable of such explanation, then the defendant should be acquitted.

In *Gambrell v. State*, 92 Miss. 728, it is held that where there is doubt about the advisability of an instruction being given, the doubt should be solved in favor of the defendant.

If there is a probability of the innocence of the defendant, he should be acquitted. *Nelms v. State*, 58 Miss. 362.

Before an accused can be convicted by circumstantial evidence, all the facts must be inconsistent with his innocence. *Horn v. State*, 81 Am. Dec. 500.

The burden of proof rests upon the state to establish the truth of every link in its testimony beyond every reasonable doubt, and the jury should be so instructed. *People v. Aiken*, 11 Am. St. Rep. 512.

Circumstantial evidence should be so strong as to exclude every hypothesis inconsistent with the defendant's innocence. *Sumner v. State*, 36 Am. Dec. 561.

We respectfully submit that taking the entire record in this case, it does not warrant the verdict rendered.

Rodgers & Brantley and L. H. Hopkins, for appellant.

This is a case based upon circumstantial evidence on which the state relies to convict the appellant of the crime charged, and which evidence is absolutely insufficient to establish the guilt of the appellant. While it is true circumstantial evidence may be relied upon to establish guilt, yet in this case, the proof as shown by the record fails to create a decent suspicion against the de-

fendant, and utterly fails to exclude the hypothesis that another person might have committed the offense, for these and many other reasons the cause should be reversed. *Algeri v. State*, 25 Miss. 588; *Whetson v. State*, 12 So. Rep. 661.

Jas. R. McDowell, assistant attorney-general, for appellee.

In the brief of Messrs. Watkins & Watkins for the appellant, it is urged seriously that it was error to grant instruction No. 2, a careful reading of which I again invite. Comparing it with the instruction given in the *Lipscomb case*, 75 Miss. 577, it will be observed that in the *Lipscomb case* the jury are told that circumstantial evidence must rise so high in the scale of belief, beyond a reasonable doubt, of guilt to generate full conviction. The objection there does not occur in the case at bar.

In the *Gibson case*, 76 Miss. 136, which was affirmed by the court, the very error complained of in the *Lipscomb case* is cured. See the opinion of Justice Whitfield. The instruction in the instant case, likewise, cures the defect by use of the last sentence of the instruction.

In the *Haywood case*, 90 Miss. 465, the jury are told that circumstantial evidence is as good as any other kind of evidence . . . and that the jury should act upon such evidence as readily as they would on any other kind of evidence. In the instant case, the jury are instructed that they must view circumstantial evidence with the greatest caution. In the second instruction (the one complained of) the jury are told that circumstantial evidence may rise so high in the scale of belief, etc., and "when it does rise so high in the scale of belief as to generate full conviction in the minds of the jury of the defendant's guilt beyond a reasonable doubt, then they are authorized to act upon it and convict the defendant of the crime charged." The court will readily draw the distinction between this instruction and the one in the *Haywood case*.

In the latter case the jury are told that they should act upon it as readily as upon any other kind of evidence, and that it is as good as any other kind of evidence. That is the objectionable part of the instruction, and the one given in the case at bar contains no such objectionable wording.

In *Cook v. State*, 28 So. 833, I call attention to the opinion of Judge Calhoun on page 834, in which he says: "It is not the law that circumstantial evidence is inferior to direct and positive proof. It is of equal dignity, and in weight and probative force and may, and should in many instances, surpass the other in effect upon the jury. The only restriction attached to it is that it should be received with care and caution." Here the jury are so cautioned; here they are only told that it may rise to sufficient dignity to warrant full conviction of guilt beyond a reasonable doubt. The instruction is manifestly correct.

In the case of *Williams v. State*, 95 Miss. 671, it will be observed that the instruction asked by the state, and condemned by Justice Smith, does not advise the jury that they must believe defendant guilty beyond every reasonable doubt, as is the case in the instruction complained of in the instant case. Even in the *Williams* case, however, the court declined to reverse for the reason that the instructions must be taken together and could not be held up separately and objected to, and that if it was manifest that the jury were not misled by any instruction, the case should not be reversed. See, also, *Railroad v. Hardy*, 88 Miss. 745; *Railroad Co. v. Williams*, 87 Miss. 344; *Harper v. State*, 83 Miss. 35.

I submit that the instructions taken as a whole, which I am sure your Honors will carefully review, correctly announces the law in the case.

Argued orally by *W. H. Watkins* and *H. H. Rogers*, for appellant, and *T. L. Lamb*, *R. C. Jones* and *J. R. McDowell*, assistant attorney-general, for appellee.

ANDERSON, J., delivered the opinion of the court.

The appellant, Swinton Permenter, was convicted of murder and sentenced to hang, and appeals to this court. He was convicted on evidence wholly circumstantial, made up of many different facts and circumstances. There is grave doubt, from the record in this case of appellant's guilt. The giving of the second instruction for the state is assigned as error. That instruction is as follows: "The court charges the jury that circumstantial evidence has been received in every age of the common law, and may arise so high in the scale of belief as to generate full and complete conviction in the minds of the jury of defendant's guilt; and when it does arise so high in the scale of belief as to generate full conviction in the minds of the jury of defendant's guilt beyond a reasonable doubt, then they are authorized to act upon it, and convict the defendant of the crime charged."

This instruction was clearly erroneous. It is substantially the same instruction which was condemned by the court in *Williams v. State*, 95 Miss. 671, 49 South. 513. The court said of the instruction in that case: "It is elementary law that a conviction may be had on circumstantial evidence alone, when by it guilt is proven beyond a reasonable doubt; but it is also elementary that, before such evidence can be said to prove guilt beyond a reasonable doubt, it must exclude every other reasonable hypothesis than that of guilt." The fatal defect in the instruction is that it authorizes the jury to convict on circumstantial evidence which shows guilt beyond a reasonable doubt, without going further and informing the jury that the evidence must be so strong as to exclude every other reasonable hypothesis than that of guilt; in other words, explaining what it takes to show guilt where the evidence is circumstantial. This addition to the instruction is made necessary by the inherent difference in direct and circumstantial evidence. That difference is well stated in *Haywood v. State*, 90 Miss. 461, 43 South.

614, as follows: "Circumstantial evidence is a different kind of evidence, wholly different from evidence consisting of the direct and positive testimony of eyewitnesses. In the one case, if the jury believe the testimony of the witnesses, the fact of the killing is established by their direct statements that they saw the party killed. In the other case, if the jury believe the party was killed beyond all reasonable doubt, they do so believe it from a chain of circumstances, the absence of any one link in which chain destroys the value of all other circumstances, no matter how absolutely proven. There has never been a better illustration of the weakness of circumstantial evidence than that which tells us that 'it is no stronger than the weakest link in the chain.' This essential difference in the very nature of the two kinds of testimony, circumstantial and direct, is such and so clear that it is not the law that circumstantial evidence is as good as any other kind of evidence. True enough, if, as stated, the circumstantial evidence excludes every other reasonable hypothesis than that of guilt beyond all reasonable doubt, the jury are just as much bound to convict as if the guilt had been shown by the direct evidence of eyewitnesses; but this does not alter the fact that the inherent nature of the two kinds of evidence is different, nor the other fact that the only thing which invests mere circumstances with force of proof is the absolute exclusion of every other reasonable hypothesis than that of guilt. . . . The clear difference between circumstantial evidence and direct evidence is pointed out by Prof. Wigmore in the first volume of his work on Evidence (section 25), in a quotation from Wills on Circumstantial Evidence, cited with approval by him as follows: 'The different writers, ancient and modern, on the subject of evidence, have concurred in treating circumstantial evidence as inferior in cogency and effect to direct evidence, a conclusion which seems to follow necessarily from the very nature of the different kinds of evidence.' "

Proof of guilt by circumstantial evidence consists in the proof of facts from which guilt is inferred. The fact of guilt is arrived at by process of reasoning and deduction from the proven facts. Where direct evidence is relied on to establish guilt, only one step is taken, namely, the facts are proven, which must show guilt beyond a reasonable doubt. But where circumstantial evidence is relied on, another step must be taken. In addition to proving the facts beyond a reasonable doubt, those facts must be such as to exclude, beyond a reasonable doubt, every other hypothesis than that of guilt. In other words, where circumstantial evidence is relied on, proof of the facts beyond a reasonable doubt of itself proves nothing, unless the inference deducible from the facts so proven excludes beyond a reasonable doubt every other hypothesis than that of guilt. The fault of the instruction is that it authorizes the jury to convict if the facts are proven beyond a reasonable doubt, wholly disregarding whether the inference of guilt drawn therefrom excludes beyond a reasonable doubt every other hypothesis. Under the facts of this case, an instruction properly defining circumstantial evidence would have been peculiarly applicable. On the other hand, the instruction under consideration, in view of the facts of the case, was in a marked degree inapplicable and misleading. The error in it is neither cured by any other single instruction, nor all of the instructions taken together. We refrain from further comment on the evidence, as there may be another trial of the case. Suffice it to say, the instruction in question was calculated to materially influence the jury in rendering their verdict.

The other errors alleged are not well founded.

Reversed and remanded.

WILL HOLLINGSBED v. YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY.

[55 South. 40.]

1. ACTIONS. *Negligence. Proof. Variance. Personal injury. Damages.*
Code 1906, section 1985.

In an action for damages for personal injuries where the declaration charges gross negligence and intentional wrong, the plaintiff may recover actual damages where only negligence is shown as the allegation of gross negligence includes negligence, the greater including the less.

2. WANT OF ORDINARY CARE. *Actual damages. Physical and mental suffering.*

In an action for personal injury where the evidence shows that the injury complained of was the result of a want of ordinary care alone on the part of defendant, the plaintiff should recover not only for medical bills and loss of time, but also for physical pain, and mental suffering as the result thereof, as these are all elements of actual damages.

3. CODE 1906, SECTION 1985. *Prima facie negligence.*

Code 1906, section 1985, providing that "proof of injury inflicted by the running of the locomotives and cars" shall make out a *prima facie* case of negligence is applicable as well where a crowd of witnesses see the injury as where the manner of the injury inflicted is not known to others than the employees of the railroad.

APPEAL from the circuit court of Quitman county.

HON. SAM C. COOK, Judge.

Suit by Will Hollingshed against the Yazoo & Mississippi Valley Railroad Company. From a judgment for a small amount for the plaintiff, he appeals.

The facts are fully stated in the opinion of the court.

W. F. Gee and T. E. Williams, for appellant.

In this case there can be no question of contributory negligence for the proof is all one way that plaintiff

below was in the camp cars on the spur track by the authority of the defendant and had been placed in that situation by the employes of defendant.

By the third, fourth and fifth instructions given for defendant, the court lays down the rule that before the plaintiff can recover it must appear from the evidence that the defendant was guilty of reckless misconduct, intentional wrong or gross negligence. These three instructions are in direct conflict with instruction No. 8 given for defendant and instruction No. 2 given for plaintiff wherein the court lays down the rule that plaintiff is entitled to recover if the defendant was guilty of lack of ordinary care and caution.

These instructions being in direct conflict left the jury no guide by which to arrive at a correct verdict and this is reversible error. 11 Ency. Plead. & Prac., p. 145; *Whitfield v. Westbrook*, 40 Miss. 311; *Railroad Co. v. Miller*, 40 Miss. 45; *Cunningham v. State*, 56 Miss. 269; *Railroad Co. v. Kendrick*, 40 Miss. 374; *Herndon v. Henderson*, 41 Miss. 584; *Solomon v. Compress Co.*, 69 Miss. 319.

Instruction No. 8 given for defendant is clearly erroneous because by it the jury is limited in the verdict it may render to fifty dollars for wages lost and twenty-seven dollars for medical attention and informed that it could not, in any event render a verdict in excess of this amount which was seventy-seven dollars. In giving this instruction the court evidently proceeded on the idea that as the declaration only alleged a loss of fifty dollars for lost time, the recovery could not be in excess of this sum. This was error. The mere fact that the plaintiff undertakes to enumerate some portion of his general damage which he might have proved without alleging will not preclude him from proving other general damage. 5 Ency. Plead. and Practice, p. 719.

Acting under this instruction the jury could not allow for physical suffering which they might have allowed un-

der the pleading and proof, but which they did not take into consideration as may be seen from the evidence. Plaintiff proved by his testimony that his medical bill was twenty-seven dollars and that he had lost wages amounting to one hundred and twelve dollars and fifty cents, being two and one half months at forty-five dollars per month. The verdict of the jury was for one hundred thirty-nine dollars and fifty cents, the exact amount the plaintiff testified he had lost in wages and in medical bills which clearly indicates that the jury followed the sixth instruction and did not allow for physical suffering. This instruction was erroneous. 13 Cyc., pages 185 and 186; *Railroad Co. v. Ragsdale*, 46 Miss. 458; Ency. Pleading and Practice, p. 717, vol. 5.

Defendant's instructions Nos. 4 and 5 should have been given by the court. The trial court evidently proceeded on the theory that as the declaration alleged gross negligence and proceeded on the theory of punitive damages, there could be no recovery of actual damages unless gross negligence should be shown. The case of *Silver v. Kent*, 60 Miss. 124, holds that under a declaration framed on the theory of gross negligence and punitive damages only, all actual damages may be recovered in case gross negligence is shown. 60 Miss. 124; *Telegraph Co. v. Jackson*, 49 So. Rep. 737.

Under the rule in this state where the declaration alleges mere negligence and damages are claimed without asking for punitive damages, yet the character of such negligence as gross may be shown and punitive damages recovered. *Express Co. v. Brown*, 67 Miss. 260.

If a plaintiff in his declaration may allege mere negligence and ask for damages generally, without asking for punitive damages, as he may do under the authority of *Express Co. v. Brown*, and yet recover punitive damages where warranted by the proof, then surely he may allege gross negligence and ask for punitive damages in his declaration, as well as actual damages, as in this case,

and where warranted by the proof recover actual damages although he may not be entitled to punitive damages.

The court erred in refusing the 4th instruction asked by plaintiff. This instruction announced that mere negligence and carelessness on the part of defendant would justify the jury in giving plaintiff actual damages.

It is clearly proven that plaintiff was lawfully in the camp cars by permission of the defendant, with its knowledge, and that the crew in charge of the local knew of the position and situation of plaintiff, and there is no question in the case of contributory negligence. Under these circumstances the conductor in charge of the local freight was bound to use great care and to notify plaintiff of the intention to switch. Elliott on Railroads, 1265, b, and 1265, c.

The verdict should be set aside because it is contrary to the evidence. The uncontradicted proof of plaintiff and Dr. Marshall showed plaintiff suffered great physical pain; and yet the jury only awarded plaintiff one hundred thirty-nine dollars and fifty cents, the exact amount plaintiff testified he lost in wages and medical attention, thus showing that the jury ignored the third instruction given for plaintiff and did not consider any damages arising from physical suffering. 13 Cyc., p. 185 and 186; *Railroad Co. v. Ragsdale*, 46 Miss. 458; Ency. Pl. & Prac., p., 717, vol. 5.

W. A. Scott, for appellee.

It does not appear that manifest harm or prejudice or wrong was done this appellant by the granting or refusing of any of the instructions complained of, and unless it does so appear, the rule of this court is not to disturb the verdict of the jury.

“Where a circuit judge is called upon in the excitement of a *nisi prius* trial to give a great number of instructions, this court is loath to reverse a case because of error

in some of them, unless it be manifest that prejudice has been done the accused." *Pollard v. State*, 53 Miss. 410.

"Error in refusing an instruction will not cause a reversal if the verdict is supported by the evidence." *Railroad Co. v. Field*, 46 Miss. 573.

After this court shall have read the evidence adduced in the court below I cannot believe there is any possibility of a reversal of this case, for, if the object of the courts is to dispense justice between parties litigant, it manifestly and undeniably appears in this case that this appellant succeeded in wresting from a jury a verdict for an amount largely in excess of what he was entitled to.

Nevertheless it is insisted by adverse counsel that reversible error was committed by the court in granting and refusing certain instructions pointed out in his assignment of error and brief. It is first said that the third, fourth and fifth instructions for the defendant are in direct conflict with the defendant's instruction 8 and the plaintiff's instruction 2, and that therefore the jury were not furnished with any guide by which they could or did arrive at a correct and proper verdict? To indicate how inaccurate opposing counsel are, it is only necessary to direct the court's attention to the language of plaintiff's instruction number 2 above mentioned, which reads as follows: "The court instructs the jury that if they believe from the evidence that the injury complained of was caused by the gross negligence and carelessness of the servants of the defendant in charge of the local freight train, and could have been avoided by ordinary care on the part of said servants, then the jury will find for the plaintiff and assess his actual damages at the amount shown by the evidence not in excess of the amount demanded in the declaration." This instruction so asked and given at the instance and request of the plaintiff is on all-fours with the defendant's instructions

Nos. 3, 4 and 5. Wherefore, we confidently assert that the plaintiff cannot take advantage of this supposed error upon which he mainly relies for a reversal of this case.

The rule in this regard as announced by this court is as follows:

“One cannot assign for error the action of the trial court in giving an instruction for the opposite side, when he asked and obtained, as announcing the law of the case, an instruction to the same effect.” *Insurance Co. v. Van Os*, 63 Miss. 439; *Wilson v. Zueck*, 69 Miss. 694.

The rule as thus announced has been repeatedly reaffirmed by this court. In the case of *Hitt v. Jerry*, 92 Miss. 871, this court, in speaking of alleged erroneous instructions on pages 704 to 708 inclusive expressly laid down the rule here contended for, and at the bottom of page 707 say, referring to the sixth charge given for the appellee in the court below which was vigorously assailed in this court, as follows: “Another instance of both sides asking the same principles of law, and in identically the same language, and yet counsel for the proponent complain of the contestants for asking the court to charge the jury, and about the very same thing or a similar thing.” See, also, to the same effect: *Railroad v. Scragg*, 84 Miss. 125, bottom p. 153 and p. 154.

In this connection it is insisted that the plaintiff was entitled to recover if the proof was sufficient to satisfy the jury that the appellee was guilty of mere negligence which was the proximate cause of the injury complained of. As to this proposition, we call the court’s attention to the plaintiff’s cause of action, as alleged in his declaration, but, in the language of the declaration: “Said collision was caused by the agents and employes of the defendant operating said freight in the line of their duty and scope of their employment as agents of the defendant, willfully and out of a spirit of utter disregard of the rights of the plaintiff and by reason of

their gross negligence and that of the defendant." To this declaration the defendant filed a plea, thus taking issue with the plaintiff upon the case as set forth in the declaration. It is not shown in this case that the wrong complained of was oppressively or willfully inflicted, but on the contrary it does appear that the alleged accident did not result from any oppressive, willful or reckless conduct or gross negligence upon the part of the appellee's employees. Therefore the case of *Silver v. Kent*, 60 Miss. 124, so much relied upon by counsel does not apply. In that case the evidence was clear and explicit that a willful and oppressive wrong had been committed, and the jury so found, and, therefore, this court announced the rule that if these allegations of willful wrong and gross negligence were sustained, then a verdict for compensatory damages might well be returned in favor of the plaintiff. However, it is well to again direct the court's attention to the fact that not only the issue between the plaintiff and the defendant in the court below was as to whether there was a willful wrong or any gross negligence shown by the plaintiff's evidence, but the plaintiff himself asked instruction No. 2, under which the jury were told that they could not return a verdict in favor of the plaintiff for actual damages, unless they believed from the evidence that the appellee or its employees had been guilty of gross negligence.

The theory upon which the plaintiff below proceeded as shown by his declaration and his instruction No. 2 was that the injury complained of resulted from the willful wrong or gross negligence upon the part of the appellee or its employees, and in the language of Chief Justice Whitfield, it cannot be said in view of the course this case took in the court below, that the plaintiff can ask here for a reversal on the idea that the testimony entitled him to recover for actual damages if the proof showed that the appellee was only guilty of mere negligence." As stated by Judge Whitfield, the plaintiff

chose his line of battle in the court below, he stood on the alleged gross negligence of the railroad company and inasmuch as his instructions were along that line it is now too late to attempt to shift the ground on which a recovery is sought in this court for the first time. *I. C. R. R. Co. v. Sumrall*, 51 So. 545; *Ry. Co. v. Scragg*, 84 Miss. 125; *A. & M. R. R. Co. v. Beard*, 93 Miss. 294.

Instruction No. 8 given for the appellee is sharply criticised, but most woefully misinterpreted and the language used in that instruction misapprehended, as will be seen by a careful reading of the same. Said instruction as given and punctuated is as follows: "The court instructs the jury that if they believe from the evidence that the defendant's engineer did not use ordinary care and caution to avoid the collision which it is claimed resulted in injuring the plaintiff, they may then return a verdict against the defendant only for such actual damages as they may believe from a clear preponderance of the evidence he is entitled to; but the plaintiff is in no event entitled to recover an amount in excess of fifty dollars for his alleged loss of time and twenty-seven dollars due by him to the witness Marshall." Thus it will be seen at a glance that the jury were not limited in their verdict as contended for by adverse counsel. If, however, defendant's instruction No. 8 can by any stretch of the imagination be justly criticised, this court is not unmindful of the rule that all of the instructions in the case must be taken and considered as a unit and by referring to the plaintiff's instruction No. 3, it will appear therefrom that the supposed error in the defendant's instruction No. 8 was distinctly and positively cured, for, by this instruction 3 for the plaintiff the jury are distinctly told that in estimating actual damages, if they desired to return a verdict for such damages, they should take into consideration any physical suffering shown by the evidence to have been sustained by the plaintiff, etc.

“Complaint cannot be made of instruction by a party who has asked and received one substantially like it.” *Phila. T. & W. B. Ry. Co. v. Howard*, 13 How. (U. S.) 307.

To permit the appellant to now take advantage of the supposed error of the court below in granting instructions Nos. 3, 4 and 6 for the appellee would, in view of instruction No. 2 asked and given him, permit any litigant to contest a case in the trial court on one theory, and, if unsuccessful there, secure in the appellate court a reversal of the judgment because of error in the legal principle which he had himself invoked, or at least acquiesced in as being both correct and applicable.

As to the alleged conflict in the instructions for the appellant and appellee, if any such conflict exists, it is due as much to the action of the appellant in asking and receiving instructions as to that of the appellee with reference to its instructions. As frequently stated, the appellant's instructions Nos. 3, 4 and 5 are substantially the same as the first part of instruction 8 asked and given the appellee. We therefore assert that the appellant cannot complain of such conflict in the instructions even though error may have been committed by the court below. *Clisby v. Railroad Co.*, 78 Miss. 937.

This is all the more true in this case because it is clear that the jury followed the correct rule of law and the result as indicated by their verdict is much more favorable to the appellant than he had any right to expect under the evidence. Again with reference to the instructions granted the appellant and appellee submitting the question of actual damages to the jury, they were under all of the facts and circumstances of this case very much more favorable than he was entitled to, and for that reason also he cannot be heard to complain. 2 Thompson on Trials, 1750; Thompson's Instructions to Juries, sec. 122; *Crisby v. Railroad*, 74 Miss. 977; *Andrews v. Condor*, 26 L. Ed. (U. S.) 90.

ANDERSON, J., delivered the opinion of the court.

The appellant, Will Hollingshed, sued appellee, the Yazoo & Mississippi Valley Railroad Company, for personal injuries, and recovered a judgment for one hundred and thirty-nine dollars and fifty cents, from which judgment appellant prosecutes this appeal.

At the time of the injury complained of, appellant was employed as a cook for a railroad logging crew. A part of this logging train consisted of two camp cars, in one of which appellant did the cooking for the employes. These two camp cars, at the time of the injury, were standing on a spur track of appellee's railroad, and appellant was in one of them, engaged about his duties. While so situated and engaged, one of appellant's trains, in making a flying switch (the place being without the limits of any municipality), ran an engine onto this spur track, where the camp cars were standing, which collided with them; the impact causing appellant's injuries. He was thrown to the floor, causing a fracture of three ribs, which confined him to his bed about two months. Appellant testified that the employes in charge of the train making the switch saw him in the camp car before the switch was made, and that in addition to and as a result of his physical injuries he paid twenty-seven dollars for medical attention, and lost two and one-half months time, which he valued at one hundred and twelve dollars and fifty cents, making a total of one hundred and thirty-nine dollars and fifty cents, the amount of the verdict in his favor.

The declaration charges that appellant's injuries were the result of a flying switch; that appellee's employes, in charge of the train making such flying switch, knew that appellant was in the camp car, and in making the switch, under the circumstances, such employes were grossly negligent, and acted willfully and out of a spirit of disregard for the rights of appellant. By instructions numbered 1, 3, 4, and 5, the jury were directed to return a

verdict in favor of appellee, unless appellant's injuries were caused intentionally, or through the gross negligence of appellee's employees. By instruction No. 4, refused by the court, appellant sought to have the jury instructed to return a verdict in his favor for compensatory damages, if the evidence showed the injury was caused by the negligence of appellee's employees.

In giving and refusing these instructions, respectively, the court below manifestly acted on the theory that appellant was not entitled to recover anything, unless intentional wrong or gross negligence was shown, because such wrong and negligence was the sole ground of recovery set out in his declaration; that under a charge of intentional wrong and gross negligence there could be no recovery for actual damages, even though negligence had been proven. An allegation of gross negligence includes negligence. The greater includes the less. Both are negligence. They only differ in degree. In *Silver v. Kent*, 60 Miss. 124, it was held, where the declaration charged that the injury complained of was done intentionally, and through gross negligence and a reckless disregard of plaintiff's rights, a recovery could be had for compensatory damages. Under the declaration and the evidence in this case, the appellant had the right to have submitted to the jury in addition to the question of punitive damages, the question of compensatory damages; and in determining the latter the jury should have been instructed to take into consideration whatever the evidence showed appellant incurred as necessary expenses, including medical bills and loss of time, and, in addition, any physical and mental suffering shown by the evidence to have resulted from the injury. It follows that the court erred in giving instructions numbered 1, 3, 4 and 5 for appellee, and in refusing instruction No. 4 for the appellant.

By instruction No. 8, for the appellee, the jury were informed that, if the evidence showed the injury com-

plained of to be the result of a want of ordinary care alone on the part of appellee, then their verdict should be limited to the amount of appellant's medical bill and the value of the time lost by him. This instruction is erroneous, because, in addition, the appellant was entitled to full compensation for any physical and mental suffering the evidence showed resulted from the injury. Physical pain, and mental suffering as the result thereof, are elements of actual damages.

By instruction No. 5, refused by the court, the appellant sought to avail himself of section 1985, Code of 1906, which provides that "proof of injury inflicted by the running of the locomotives or cars" shall make out a *prima facie* case of negligence. The appellant was clearly entitled to the benefit of this statute. He was injured by the running of appellee's locomotive. There is no dispute about that. The statute applies, regardless of whether the facts attending the injury are in evidence or not. In *Y. & M. V. Railroad Company v. Phillips*, 64 Miss. 693, 2 South. 537, the court said: "The statute was enacted to meet cases where the manner of the injury inflicted is not known to others than the employes of the railroad company; but it is equally applicable where a cloud of witnesses see the injury. It is not needed there, it is true; but it is not error to invoke it, for the law affects the railroad company with liability, *prima facie*, in every case of injury inflicted by the running of its locomotives or cars. If the evidence showing the injury inflicted rebuts the presumption, well; but, if it does not, the presumption created by law from the fact of the injury in this mode is to stand and control." It was, therefore, error to refuse this instruction.

Reversed and remanded.

CITY OF JACKSON v. WALTER LAIRD ET AL.

[55 South. 41.]

DEDICATION. Acceptance. Municipalities.

Where the owner made a survey of his land, laying it off into blocks, lots, streets and avenues and later sold the blocks and lots with reference to such streets and avenues, and afterwards the corporate limits of the city were extended so as to include said land, and the city assessed the blocks and lots of this addition for taxation, but not the streets and avenues, and the city worked a portion of the streets shown on such addition but not the particular street upon which the accident occurred. *Held*, that these facts constitute a dedication to and an acceptance by the city of the dedication to public use of the streets and avenues of such addition and renders the city liable for damages occasioned by its failure to keep up and repair such streets and avenues.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by Walter Laird et al. against the city of Jackson. From a judgment for plaintiff the defendant appeals. The facts are as follows:

This is an action by the appellees against the city of Jackson for damages for the death of a small negro boy, who fell into an open cistern and was drowned. The cistern in question is located on what is known as Convent avenue, being a street of the city of Jackson in what is known as "Split Addition." The land embraced in Split Addition was owned by one Griffith, who platted the property in 1888 and dedicated certain streets to the public use. Since this date the property which has been sold in this addition was conveyed by lots and blocks with due regard to streets. In 1904 the city limits were extended so as to take Split Addition into the corporate limits. For a long time Convent avenue was unused; but

it seems from the record that since 1907 it has been unobstructed and used to a limited extent by the traveling public, its boundaries being marked by a fence. It seems, also, that prior to the time the city limits were extended the county board of supervisors had the plat of this addition recorded. There was no order on the minutes of the board accepting the dedication of the streets out in this addition.

It is the contention of the city that there had been no acceptance of the dedication of the streets of Split Addition by the city. No order appears on the minutes of the municipal board. The appellee contends that when the city limits were extended, so as to take in Split Addition, this was an acceptance of the highway dedicated to the county and accepted by the county; it being contended by appellee that the act of the board of supervisors in ordering the record made of Split Addition amounted to an acceptance of the dedication. It is also shown by the record that the taxes paid on the property in Split Addition were by lots, and that no tax was ever required on the streets and avenues of said addition. Appellees contend that the action of the city in not requiring taxes amounts to the acceptance of the dedication, and that it is not necessary by ordinance to accept such dedication.

From a judgment for three thousand dollars the city appeals.

Robert Powell, for appellant.

In this case there was a dedication, so far as the original owners of the land were concerned, of what is now called Convent avenue, but in order to make the city liable for the failure to properly care for the street, something more than a dedication by the owners is required.

In the case of *Harrison County v. Seals*, 66 Miss. 129, this court says:

“Where the owner dedicates land for public use as a road or street, in order to constitute it such a highway as the public is under obligation to keep in repair, there must be an acceptance of the dedication by the constituted authorities. The acceptance may be by formal adoption, or by repairing, or probably by long public use with the assent of the authorities.”

In the case of *Kennedy v. Cumberland* (Md.), 7th Cent. Rep. 409, the court says:

“The fact that an individual lays out a street through his land and dedicates it to the public use, does not impose upon the county or municipality the duty of improving or keeping it in repair. There must be an acceptance of the dedication before this duty can arise.”

“Again dedication without acceptance does not make a public street.” *People of New York v. Leohfelm* (Anens), 2nd Cent. Reports 875.

“Land dedicated for a highway does not *ipso facto* become a highway and will not become one until the proper municipal authority has accepted it. *Boardem v. North Hudson County R. R. Co.*, 39 N. J. Eq., p. 465.

“A dedication may be complete as against the proprietor without any formal acceptance on the part of the public but in order to charge the municipal or local district with the duty to repair or to make it liable for inquiries for suffering a street or highway to be or remain defective there must be an acceptance of the dedication, which acceptance must be by the proper or authorized public authorities. It may be made at any time during the continuance of the gift and before the tender is withdrawn. Am. & Eng. Ency. of Law, Old Series, vol. 5, pp. 413 and 414, and authorities there cited.

In “Roads & Streets” by Elliott, 2nd Ed., sec. 150, the author says:

“In order to make a dedication complete on the part of the public as well as the owner, and to charge the public corporation having jurisdiction over highways

with the duty of repairing the way, there must be an acceptance of the dedication by the public or the proper local authorities. The owner may, as a rule, recall his dedication at any time before it has been accepted. Until there has been an acceptance, the public cannot be charged with the duty of repairing, nor is there any liability for injuries caused by an unauthorized person, or by an officer not possessing authority over the highway, will not bind the public. See also numerous authorities cited under this section.

In this case the only acceptance attempted to be shown by the city is that the assessor of the city, without any order from the board of aldermen, copied from the records of the maps in the chancery clerk's office, and under this authority the assessor could not bind the city by such action. It is true that an acceptance on the part of the city may be implied, but we submit that under the facts in this case that the city has done nothing showing an intention to accept Convent avenue as a street and from the testimony the city had no knowledge that such a street existed.

In the second place by a comparison of the two maps shown in the evidence, one showing Convent avenue thirty feet wide and the other showing Convent avenue forty feet wide. It is impossible to say that the cistern into which the boy fell was included within the boundary of the supposed street at all.

We further contend that as the child was shown to be very sensible, and had been especially warned in regard to the cistern into which he fell, it should have been a question for the jury to have decided upon his mental capacity under the pleading and it was for the jury to say whether he was guilty of contributory negligence or not. And in such case a peremptory instruction should not have been given for the plaintiff.

In Beach on Contributory Negligence, sec. 117, the author announces the rule as follows:

“Unless the child is exceedingly young, it is usually left to the jury to determine the measure of care required of the particular child and the actual circumstances of the case and this doctrine is approved in *Howell v. R. R. Co.*, 75 Miss. 242.”

We submit that as the cistern was in an open place, the boy a very reasonable child, the locality adjoining the boy's residence, the knowledge of the boy of the surroundings and the fact that he had been warned by his father, all these circumstances make such a case as that the jury should have been permitted to pass on the contributory negligence of the child.

We further contend that under the facts in this case the peremptory instruction asked by the city should have been granted.

Harris & Potter, for appellee.

In the year 1904 the corporate limits of the city of Jackson were extended so as to take in and include Split Addition, and the same since that time has been a part of the city of Jackson. Prior to that time, in 1896, the board of supervisors of Hinds county evidently desiring to fix the county's rights in suburban dedications of easements, directed the county surveyor to make copies of the plats where land had been dedicated and to record the same in the surveyor's record book of Hinds county. Under this order of the board of supervisors, the county surveyor made copies of such plats, including that of Split Addition and recorded the same in the surveyor's record book of the county. It was admitted to be a fact on the trial that no order to this effect was entered upon the minutes of the board.

“If no record of an order of acceptance of a dedication is made and the foundation for this is laid, parol evidence is competent.” *Elliott on Roads & Streets*, 2nd Ed., sec. 151.

The record shows an order made by the board of supervisors paying the county surveyor the sum of fifty dollars for making copies of these plots. One of our contentions is that this deliberate act on the part of the board of supervisors is a more striking acceptance than would be an acceptance by a map ordered generally, and made by a surveyor of a county or town and adopted by the board. We also contend that the city of Jackson, by the extension of its corporate limits, so as to take in Split Addition, was an acceptance of the highway involved, by the city of Jackson.

"When an amended charter is accepted which adds to the municipal corporation, territory previously laid off and plotted, there is an implied acceptance of the streets and alleys designated in the plot." Elliott on Roads & Streets, 2nd Ed., p. 162.

The record shows that the city of Jackson has appropriated Blair and the other streets dedicated by Mr. Griffith, worked and made them into public streets.

In the case of *Dallas v. Gibbs*, 27 Texas Civ. App. 275, the court after citing *Town Council v. Lithgal*, 7 Richardson's Law 435, which held that digging a public well on the dedicator's way was an acceptance, that court held:

"If digging a well on the dedicator's land is an acceptance of the land for street purposes, much more so would it be acceptance when two-thirds or perhaps more of the land is at once opened up as a street. This act evinced an acceptance of the whole street as conveyed in the dedication and if there had been no other circumstances, it was sufficient to establish acceptance upon the part of the city."

"It is not essential for the city to show that the entire strip of land referred to in the plot had been used as a street, but it was essential that the whole had been dedicated as such." 6 Pet. 498 (U. S.).

In *Heitz v. St. Louis*, 110 Mo. 618, where the question was as to the dedication and acceptance of Kosciusko street, it appearing that there had been a plot filed and lots sold by plot of which Kosciusko street was a part, and the city had not accepted the dedication except by opening and maintaining Dorcas street of said subdivision, the court held:

"The city, by accepting, building and using Dorcas street as plotted must be regarded as an acceptance by the city of the whole tract plotted, and not as a bare acceptance of such portion of plotted district as the city chose to improve and did improve."

"The laying out of streets by a proprietor over his land, and selling of lots with reference thereto, is assimilated to a contract.

The proprietor engages to give the ground for the streets, according to his plat, upon the condition that the public shall accept or ratify it. Such acts are irrevocable; it is too late after they are done to assume absolute control over the property thus devoted to the public use. Nor is it necessary in order to manifest a ratification or acceptance of the dedication that the municipal authorities should presently open the streets; that may be postponed until the advancing population and private improvements make it necessary." *Briel v. Natchez*, 48 Miss. 423.

"Acceptance is evidenced either by the action of some civil authority representing the public, or by a purchase of lots by private persons, based upon the dedication, or by some use of the property by the public which implies an acceptance and estops the grantor." *Stanford*, 52 Miss. 383.

"When people build on the side of and with reference to a public street, they acquire an easement in its free uses by them and the public and in the resultant value of such user. This is property and cannot be taken from them or damaged by closing the street, except upon

compensation first paid. . . . All the citizens of a town have the right to have their public thoroughfares, streets, or alleys, whether acquired by dedication or use, kept open for their own use and the use of the visiting strangers who come for commerce or social intercourse." *Laurel v. Rowell*, 84 Miss. 435.

"The streets of an incorporated town are held by the corporation in trust for the public." *Vicksburg v. Marshall*, 59 Miss. 571; *Dillon Mun. Corp.*, sec. 675.

"An implied acceptance of an offer to dedicate may be shown by refraining from the levying of taxes upon the land in question." *Abbott on Corporation*, p. 176.

"It was competent to show that the supervisor had refused to assess the land." *Grandville v. Gemison*, 84 Mich. 54.

"The public used it more or less as necessity and convenience required; that it had the same use as other public alleys in the neighborhood; that the city plotted the strip as a public alley and that no taxes were assessed against it after the year 1887. These facts are sufficient to show an acceptance by the city." *Keokuk v. Hardgrove*, 116 Iowa 189.

"The defense of want of funds is really blended with another which is more prominently set forth, and is that the city was not bound to open and put in repair the street on which plaintiff was walking when injured. It was not needed for the use of the public generally and if graded would have been used by only one or two families. It is true we think a city is not called upon to open new streets in advance of public needs, and even when a street has been accepted—recognized as a public way, a different and less degree of care may suffice for one infrequently used, than for those in the heart of the town. But it does not follow because a way is used a little that the city may permit pitfalls and dangerous precipices to be made and continued in it." *Whitfield v. Meridian*, 66 Miss. 570.

The court will see that the evidence shows that in the neighborhood of the cistern were many families and children, and that about one hundred children went to the Catholic school. On the question of allowing a trap or pitfall to exist on premises: *Lipnic v. Gaddis*, 72 Miss. 200; *Whitfield v. Meridian*, 66 Miss. 570; *Osage City v. Larkin*, 2 L. R. A. 56.

The court will see that the acceptance is established, as we contended, by the action of the board of supervisors, in having the plat of Split Addition copied and recorded in the surveyor's record book, by the voluntary act of the city in extending her corporate limits so as to bring in Split Addition, by working, grading and adopting various of the streets dedicated, and by the exemption from assessment or taxation, of the land covering the dedicated way for many years, by the purchase of lots in such subdivision, relying upon the dedication and conduct of the city and by entering upon and use of the dedicated way by the public.

Counsel is mistaken in stating that the width of Covent avenue had been changed; it has always remained the same. We are sure there can be nothing in the contention that the question of contributory negligence should have been submitted to the jury.

"A child eight years old is *prima facie* incapable of contributory negligence." *Vicksburg v. McLean*, 67 Miss. 4; *Westbrook v. Ry. Co.*, 66 Miss. 560.

Here the child was only five years and three months and it is not shown to have been of exceptional capacity.

There are no disputed facts and the case presented only a question of law and the instruction for appellee, we believe to have been properly granted.

Argued orally by *W. H. Potter*, for appellee.

ANDERSON, J., delivered the opinion of the court.

The only question in this case about which there can be any doubt is whether the dedication by Griffith to

public use of the streets and avenues of "Split Addition" had been accepted by the city of Jackson at the time of the injury complained of. In 1888 Griffith made a survey and map of his land, laying it off into blocks, lots, streets, and avenues, and later sold the blocks and lots with reference to such streets and avenues. In 1904 the corporate limits of the city were extended so as to include "Split Addition." Since that time the city has assessed the blocks and lots of this addition for taxation, but not the streets and avenues. Convent avenue, where the injury occurred, has not been graded nor worked by the city, but has been used to a limited extent by the public. Other streets and avenues of "Split Addition" have been worked and kept in repair by the municipal authorities and used by the public. These facts constitute an acceptance by the city of the dedication of "Split Addition," including those streets and avenues which have not been graded and kept in repair. *Light Co. v. Montgomery*, 85 Miss. 304, 37 South. 958; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735; Elliott on Roads and Streets (2d Ed.), 162; *Carter v. Portland*, 4 Or. 339; 2 Abbott's Municipal Corporations, 1769; *Keokuk v. Cosgrove*, 116 Iowa, 189, 89 N. W. 983.

Affirmed.

LETTIE CORBIN v. STATE.

[55 South. 43.]

1. **CRIMINAL LAW.** *Application for continuance. Trial. Right of accused to be present. Constitution, section 26. Illness of accused.*

On reviewing the denial of an application for continuance by the lower court, the supreme court can only consider what is in the record.

2. **CONTINUANCE.** *Illness of accused.*

Where accused, on trial for the unlawful sale of intoxicating liquors applied for a continuance and showed that she was physically unable to attend the trial without permanent injury to her health and that she was the only material witness to contradict the testimony of the prosecution showing a sale by her, it was error for the court to refuse to grant a continuance until the next term of the court or until a later day in the term when accused could be present.

3. **VOLUNTARY ABSENCE OF ACCUSED.** *Constitution, section 26.*

In a trial for a misdemeanor the accused, may, by his own fault or misconduct, waive the right to be present, but where the accused is physically unable to attend his trial, it cannot be said that he voluntarily absents himself, and if tried in his absence, he is deprived of his constitutional right to be present.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

Lettie Corbin was tried in her absence and convicted of the unlawful sale of intoxicating liquor and appeals. The facts are fully stated in the opinion of the court.

Clyde R. Conner, for appellant.

In support of our contention that the court erred in not granting a continuance in view of the facts in this case, we do not care to cite any further authority than section 26 of the Constitution of 1890, which holds in sub-

stance, that in all criminal prosecutions the accused shall have the right to be heard by himself or counsel, or both, and to be confronted by the witnesses against him. We must confess that, after a careful and thorough examination of our Mississippi Reports, we are unable to find a case reported with the facts similar to the one at bar, and can only account for this strange fact by the supposition that, heretofore trial judges have not allowed their zeal for convictions to so blind and warp their mental vision as to make them unmindful of the fundamental law of the land, that is to say, the Constitution of the state of Mississippi. It is true that this proposition is touched upon in the case of *Garmon et al. v. State*, 5 So. Rep. 385; there Arnold, C. J., says that on a trial of accused for a misdemeanor: "As to appellant Joe Garmon, it was error to require him to leave the courtroom with other witnesses during the progress of the trial. It was his right to be present, and to see and hear what occurred in the trial, and to advise and assist his counsel; and the fact that he was a witness as well as a defendant did not deprive him of this right. And it does not alter the case that he was being tried for a misdemeanor, instead of a felony, or that he might by his own default or misconduct, have waived his right to be present." There is no doubt but that the appellant Corbin was denied this right to be present during the trial of this case; and that her absence was not voluntary, but due to the fact that she was sick and unable to attend her trial. The witness Kelly testified that in his opinion appellant would be able to attend court by Thursday of the fourth week, that was just three days delay. If the trial court had wanted to safeguard appellant the constitutional right to be present and heard at her trial, why did he not continue this case until Thursday?

The record is uncontradicted on the point that appellant was the only person who was able to testify that she was not guilty of the crime charged in the affidavit.

We hardly deem it necessary to cite authorities holding it reversible error for a trial court to refuse an application for a continuance where it is shown that a material witness is absent on account of sickness, yet, at the risk of appearing tedious, we are going to refer briefly to a few of the late cases decided by this court. In the case of *State v. Vollm*, 5 So. 275, Chief Justice Whitfield said:

“We think the court below erred in not granting the continuance, or, at least setting the case for a later day in the term. The application for a continuance was based on the ground that Mrs. Hall, who was witness to the execution of the receipt in question, and who was within the jurisdiction of the court, and who had been served with process, and who was then within the county, but sick, would testify that the clause alleged to have been unlawfully inserted in the receipt was in said receipt when said J. C. Prather signed it, and that defendant did not insert into said receipt or instrument the words and matter set out in said indictment as having been inserted after Prather signed receipt. The affidavit for continuance further showed that there was no other witness by whom these facts could be proven. It is manifest that the testimony of Mrs. Hall was of the most vital character, and the court should certainly have either set the case for a later day of the term, or, if she should not have recovered from her illness, have continued the case until the next term.” The case above cited is exactly in point with the one at bar.

In the case of *Casey v. State*, 50 So. 978, where the sheriff found one of the witnesses, a woman, at home, claiming to be sick. He forced her to get out of bed and attend the trial, but she was so hysterical she was unable to testify. The defendant's attorney made motion to have the case passed until a later day of the term, which was overruled. The court speaking through Chief Justice Whitfield, says: “Undoubtedly, under the showing

made in the record, this case involving the life of the appellant, should have been postponed until Monday from late Saturday afternoon." We are unable to see why the court should not have continued the case at bar until Thursday, after the doctor had testified that in this opinion she would be able to attend court Thursday or Friday anyway.

The case of *Caldwell v. State*, 37 So. 816, is one in which the appellant was charged with the unlawful sale of intoxicating liquors, and in his motion for a continuance sets up that his wife is material witness for defendant, that she was sick and unable to attend court, that he expected to prove by her that he did not sell the whiskey and that she would be present at the next term of court. The court said: "In view of the statement contained in appellant's affidavit for continuance were not denied or in any way discredited, the application should have been granted." We do not care to quote from any other opinions of the Supreme Court, for it has universally held that when a trial court refuses an application for a continuance after a showing has been made the case will be reversed. And in support of this assertion we respectfully submit the following cases: *Haven v. State*, 23 So. 181; *Whit v. State*, 37 So. 809; *Scott v. State*, 31 So. 710; *Watson v. State*, 33 So. 491; *Fooshee v. State*, 54 So. 148; *Woodward v. State*, 42 So. 167; *Watts v. State*, 44 So. 36; *Magee v. State*, 45 So. 360; *De Sliva v. State*, 45 So. 611; *Anderson v. State*, 50 So. 554; *Casey v. State*, *supra*, cited; *State v. Vollm*, *supra*, cited; *Dobbs v. State*, 51 So. 915; *Knox v. State*, 53 So. 695.

In conclusion we unhesitatingly state, that after a careful consideration of this case, viewed in the light of the cases above cited, that this should be reversed on either of the above grounds first set out in the assignment of errors, that is to say because the defendant was denied the right to be present during the progress of

her trial, and because she was a material witness in her own behalf.

Jas. R. McDowell, assistant attorney-general, for appellee.

The appellant was convicted of selling liquor. Her case was called for trial in the circuit court on the second day of the term, and was postponed because of her alleged illness. It was called several times during the term and she always managed to be sick, though would frequently be well between spasms, it so happening that she always had a relapse about the time for the trial. Finally, on the fourth week she filed application for a continuance, accompanied by an affidavit from an M. D. with a police court record. She says in the affidavit she is the only material witness in her own behalf, and that if she were present, she would swear she didn't sell the liquor. Her plea of not guilty which was entered for her practically accomplishes the same purpose. She does not set up any facts in this affidavit which seem to contradict in any way any of the State's testimony, which abundantly supports the verdict of guilty. And even admitting that she would deny guilt, there could have been no other verdict unless an arbitrary one. She had no witnesses to corroborate her in any thing, and the proof is too clear against her to permit interference now, unless she was deprived of some right guaranteed her by the Constitution, which is not the case, since this is a misdemeanor and is properly triable in her absence. She had sufficient opportunity to appear and it seems evident she was playing for time, as she had no defense to offer. No one forced her to be absent and she could have appeared on several occasions during the term of the court, if she had desired, but having no defense, it is evident she did not desire to be present.

To summarize, the case was properly triable in the absence of the defendant. A sufficient showing is not

made for her absence. If what she says in her affidavit is true, it could not have helped her case for a simple denial could have had no more effect on the jury than a plea of not guilty. She was represented by counsel and had weeks to prepare her defense, and yet no defense is offered. The verdict is manifestly proper and the case should be affirmed.

ANDERSON, J., delivered the opinion of the court.

The appellant, Lettie Corbin, was convicted of the unlawful sale of intoxicating liquors, and appeals to this court.

The only ground relied on for a reversal was the refusal of the court below to grant appellant's application for a continuance. When the case was called for trial, appellant's attorney presented an application for a continuance, sworn to by himself, in which he set up that appellant on account of sickness was unable to be present at the trial, and if present she would testify she did not make the alleged sale, and in support of this application presented the affidavit of Dr. Kelly, appellant's attending physician, to the effect that she was suffering with a serious female trouble, that she had fever, her temperature being 103 degrees, and in his judgment, if she was brought to court and forced to go through a trial, it would probably result in permanent injury to her health, and might necessitate an operation endangering her life. On the hearing of the application Dr. Kelly was introduced as a witness, and testified to substantially the same facts as set out in his affidavit. He stated, further, that in his judgment she would be able to attend her trial at a later day in the term. The application was made during the fourth week of the term; the case having been delayed from time to time on account of appellant's sickness. The court overruled the application, and appellant was tried in her absence.

The court below may have been in possession of facts and circumstances with reference to the condition of appellant, not shown by the record in this case, which was influential in denying the application for a continuance. But this court can only consider what is in the record.

Appellant was a material witness in her own behalf. When the alleged sale was made, there was no witness present, except state's witness Williams. She had no testimony to offer, except her own, in denial of the alleged sale. Our judgment is the court erred in not either delaying the case to a later day in the term or continuing it until the next term of court.

Furthermore, the appellant had the constitutional right to be present when tried; such right being guaranteed by the twenty-sixth section of the Constitution, which applies to trials for misdemeanors as well as felonies. In a trial for a misdemeanor, the accused may, by his own fault or misconduct, waive the right to be present. In *Garmon et al. v. State*, 66 Miss. 196, 5 South. 385, Garmon, who was being tried jointly with another for a misdemeanor, was forced by the court to go under the rule with the other witnesses. The court said: "It was his right to be present, and to see and hear what occurred in the trial, and to advise and assist his counsel; and the fact that he was a witness, as well as a defendant, did not deprive him of this right. And it does not alter the case that he was being tried for a misdemeanor, instead of a felony, or that he might, by his own default or misconduct, have waived his right to be present."

Where a party accused of crime is physically unable to attend his trial, it cannot be said that he voluntarily absents himself; and, if tried in his absence, he is thereby deprived of his constitutional right to be present.

Reversed and remanded.

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Statement of the case.

PALATINE INSURANCE COMPANY LT'D v. KATE NUNN.

[55 South. 44.]

1. FIRE INSURANCE. *Total loss. Limitation of liability. Policy.*

Where the loss by fire is partial, but the injury by fire has rendered the building insured unfit for use for the purpose for which it was constructed and there are ordinances or there is a law prohibiting its reconstruction, the loss in such case is a total loss.

2. CODE 1906, SECTION 2592. *Valued policy law.*

A provision in a fire insurance policy that the insurance company shall not be liable beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of building, is written out of the policy by the valued policy law under Code 1906, section 2592.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by Kate Nunn against the Palatine Insurance Company Limited. From a judgment for plaintiff the defendant appeals.

The facts are as follows:

Appellant instituted suit upon a policy of two thousand and five hundred dollars, insuring a two-story frame building from loss or damage by fire. The appellee claims in its plea that the damage is only fourteen hundred dollars, and is therefore not a total loss. To this plea a replication was filed, which set up that the house was within the fire limits of the city, and could not be repaired and rebuilt as a frame building, and was therefore useless, and the loss amounted to a total loss. A demurrer was filed to the replication, which was overruled; and, the insurance company declining to plead further, final judgment was rendered for the full amount sued for.

Green & Green, for appellant.

Filed an elaborate brief contending first that the valued policy law, Code 1906, section 2592, does not apply to the contract in this case; and second that conceding the applicability of the valued policy law to the contract in the case, it was not a valid exercise of power; and third that conceding the applicability of the valued policy law and its constitutionality, the ordinance of the city of Jackson was void, not authorized and violative of the Constitution. Citing the following authorities: *Assurance Company v. Phelps*, 77 Miss. (1900) 658; *Insurance Co. v. Shlenker*, 80 Miss. 682; *Turnipseed v. Hudson*, 50 Miss. 436; *Brown v. Royal Insurance Co.*, 102 Eng. Common Law, 853; *Brady v. Insurance Co.*, 11 Mich. 425; *Insurance Co. v. Garlington*, 18 S. W. 338; *Association v. Rosenthal*, 108 Pa. St. 474; *Insurance Co. v. Eddy*, 54 N. W. 856; *Sandberg v. St. Paul & D. R. Co.*, 83 N. W. 410; *Insurance Co. v. Garlington*, 66 Tex. 103, 18 S. W. 337; *Brady v. Insurance Co.*, 1 El. & El. 853; *Association v. Rosenthal*, 108 Pa. St. 471, 1 Atl. 303; *Monteleone v. Insurance Co.*, 47 La. Ann. 1563, 18 South. 473; *Joyce Ins.*, sec. 3170; *Monteleone v. The Royal Insurance Co.*, 47 La. Ann. 1563, 18 South. 472; *Hewins v. London Assurance Corp.*, 184 Mass. 178; *McCrady v. Insurance Co.*, 61 App. Div. 584; *Association v. LeFlore*, 53 Miss. 1; *Ex parte Drexel*, 147 Cal. (1905) 766; *Mugler v. Kansas*, 123 U. S. 661, 8 Sup. Ct. 297; *Steel Co. v. State*, 66 N. E. (1903) 1007; *Allegeyer v. Louisiana*, 41 L. Re. 836; Section 1, Article 10 of the Federal Constitution; *Lochner v. New York*, 198 U. S. (1905) 56; *Harper v. California*, 155 U. S. (1184) 662; *Powell v. Pennsylvania*, 127 U. S. 678, 684; *Allegeyer v. Louisiana*, 165 U. S. (1896) 589; *Wilby v. State*, 47 So. Rep. 465; *Alley v. State*, 51 So. Rep. 467; *State v. Pipe Line*, 61 Ohio St. (1900); *State v. Marcus*, 185 N. Y. (1906) 257; 2 Story, Const. (5th Ed.), par. 1950; *People v. Otis*, 90 N. Y. 48; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285;

99 Miss.]

Brief for appellee.

State v. Loomis, 115 Mo. 307, 22 S. W. 360; *Com. v. Perry*, 155 Mass. 117, 28 N. E. 1126; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *State v. Jacobs*, 98 N. Y. 98; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 363; *Millett v. People*, 117 Ill. 294, 7 N. E. 631; *Ritchie v. People*, (Ill. Sup.), 40 N. E. 454; *State v. Ashbrook*, 154 Mo. 375; *Booth v. Connecticut*, 4 Conn. 67; *Van Horn v. Dorance*, 1 L. Ed. 391.

Harris & Potter, for appellee.

The question is here presented whether the loss was total or partial.

"The fair and reasonable interpretation of a policy of insurance against loss by fire, will include within the obligation of the insurer, every loss which necessarily follows from the occurrence of the fire to the amount of the actual injury to the subject of the risk, whenever that injury arises directly and immediately from the fire, or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided. Under this rule, what was the plaintiff's loss in the present case: The property insured was situated within the fire limits of Detroit, within which the reconstruction or repair of any wood building injured by fire was prohibited, unless by leave of the Common council. To hold that for an injury to the property which results, without fault of the insured, in a total loss to him, so far as value and use are concerned, the insured can only receive compensation to the extent of the appraised damage to the materials of which the building was constructed, and which were destroyed, would establish a narrow, illiberal and illogical rule. The value of the building consisted in its adaptation to use, as well as in the material of which it consisted and if it could not be restored to use after the fire, the loss was total."

Brady v. Ins. Co., 11 Mich. 425.

"If a building covered by a policy is located within the fire limits of a city and is of such class that under certain conditions the city ordinances prohibit the repair or reconstruction of such building, recovery may be had as for a total loss when the repair or reconstruction of the building insured and damaged is prevented by reason of such ordinance." Cooley's Brief on Ins., vol. 4, 3050.

"In *Brady v. Insurance Company*, 11 Mich. 425, it was held that when an ordinance prevented the repair of a building which has been practically destroyed by fire, the loss was total, although the cost of restoring the building to its original condition would have been much less than the amount of insurance. The case seems to have been elaborately argued and the reasoning of the court by which the decision was supported seems to us to be sound. The same principle has been recognized in other jurisdictions. *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563; *Hamburg-Bremen Ins. Co. v. Garlington*, 56 Tex. 103; *Larkin v. Glenn Falls Ins. Co.*, 80 Miss. 527. These cases support the general proposition that, where the law prohibits the repair of a building which has been partially destroyed by fire, in the absence of any express provision in the policy to the contrary, the loss is not measured by the sum required to restore the building to its condition before the fire, but it is total, less the value of the remaining materials for removal, since the change in the building is caused solely by fire, the difference in its value caused by that change is loss or damage by fire within the meaning of the policy." *Hewins v. London Assurance Co.*, 184 Mass. 177.

Under the city ordinances forbidding the repair of any wooden building within the fire limits, destroyed to the extent of one third of its value, a building so injured by fire constitutes by reason of the ordinance, a total loss. *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 66 Tex. 103.

A building is totally destroyed where it is injured by fire to such extent, that under an ordinance of the municipality, it being within the fire limits, it can not be repaired, as such ordinance is a part of the contract of insurance and the insurer is bound thereby. *Larkin v. Ins. Co.*, 80 Miss. 527; *Ins. Co. v. Rosenthal*, 108 Pa. 474; *Ins. Co. v. Eddy*, 54 N. W. 856; *Sandberg v. St. Paul & D. R. Co.*, 83 N. W. 410; *Monteleone v. Royal Ins. Co.*, 56 L. R. A. 784, and note; Joyce on Ins., sec. 3170; May on Insurance, sec. 421a.

The question is presented in this case whether or not under our valued policy law, a company can limit its liability in a case of a total loss, as is here shown to have been sustained, by inserting in the policy a provision that the company shall not be liable "beyond the actual value destroyed by fire, for loss occasioned by ordinances or law regulating construction or repair of buildings."

"An insurance company must determine the valuation of the property. It can then insure such parts of that valuation as the parties may agree on, but whatever amount it does insure, receiving premiums on that amount, is the final measure of its liability in case of total loss, and it can not reduce this amount by inserting in the policy provisions seeking to impose upon the insured the burden of co-insurer. The amount named in the policy and on which amount the insured pays premium, is practically liquidated damages in case of a total loss. There is nothing harsh about the law. It was manifestly enacted to meet and remedy a thoroughly well known evil, and it is as perfectly a part of the contract, being written into it, as any other stipulation therein. The statute supervenes all policies issued under it and writes out of them all stipulations inconsistent with itself." *Insurance Co. v. Philips*, 77 Miss. 625; *Insurance Co. v. Shlenker*, 80 Miss. 667; *Insurance Co. v. Enslee*, 78 Miss. 157; *Insurance Co. v.*

Antram, 86 Miss. 224; *Havens v. Ins. Co.*, 26 L. R. A. 107, and note.

Counsel for appellant contends that section 3352, Code 1906, does not give the city of Jackson authority to enact the ordinance set out in the replication. This section gives the city the right "to establish fire limits; to regulate, restrain or prohibit the erection of buildings made of sheet iron, wood or any combustible material within such limits as may be prescribed by ordinance." This section not only gives authority to establish a fire limit, which we think would be enough (*Alexander v. Greenville*, 54 Miss. 659), but under section 3352, the city is given authority to regulate buildings made of sheet iron, wood or any combustible materials to restrain buildings made of combustible material within the fire limits or to prohibit altogether their erection therein.

Regulate is defined by Webster, "To adjust by rule, method or established mode, to direct by rule or restriction, to subject to governing principles of law." "To restrain is to prohibit, limit, confine or abridge a thing. It may be intended to prohibit or limit or abridge for all time or for a day only." 62 Fed. Rep. 831.

For the legislature to have been more specific when and how cities might act to prevent the great and well known evil of fire, would have been a limitation upon the power here granted. "Municipal corporations, with general power to provide for the safety of their inhabitants . . . may, where this is consistent with the general and special legislation applicable to the municipality, establishes fire limits and prevent erection therein of wooden buildings." Dillon on Munic. Con., sec. 405; Tiedeman on Lim. Police Power, sec. 122.

"Of the power of the common council to pass the ordinance in question, we have no doubt. They contravene no public policy of the Constitution as we read it, and they were made in the exercise of a police power neces-

sary to the safety of the city. . A regulation of the use of property or a prohibition of its repair when partially destroyed, cannot, to my mind, be regarded as a condemnation to public use. *Brady v. Ins. Co.*, 11 Mich. 425; *Davidson v. Walla Walla*, 21 L. R. A. 454; *State v. Johnson*, 114 N. C. 846; *Klingler v. Bickel*, 117 Pa. St. 326; *Alexander v. Greenville*, 54 Miss. 659.

In *State v. Johnson*, *supra*, where a building owned by Johnson of the value of two thousand dollars, situated in the fire limits of a town of Winston was damaged four hundred and ninety dollars, or less than twenty-five per cent of its value. The city had an ordinance forbidding repair on any wooden building within its fire limits without the consent of the counsel. Permission to repair was refused by the counsel and repair was undertaken notwithstanding. Johnson was arrested and convicted and the case affirmed by the supreme court, it holding that "while it might be unreasonable to prohibit even the slightest repair to wooden buildings standing within the fire limits prior to the passage of a statute or ordinance establishing such limits, the power to prevent repairs is delegated and presumably exercised for the protection of property, and where a wooden structure within the bounds is partially destroyed by fire already, it is not unreasonable to require a new roof to be made of material less liable to combustion, or to forbid the repair altogether when the damage to the building is serious. The decided weight of authority in this country is that municipal corporations have the right under the general welfare clause, usually contained in their charter without express legislative grant, to establish fire limits, forbidding the erection of wooden buildings within such limits, when such regulations are not inconsistent with the general laws of the state, and to make other regulations to insure against fire." 15 Am. & Eng. Enc. of Law (1 Ed.), 1170 and numerous cases cited; 28 Cyc. 741-2.

Brief for appellee.

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In the case of *Alexander v. Greenville*, 54 Miss. 659, where there was no grant of power to establish fire limits or to regulate, restrain or prohibit the construction of combustible buildings, this court held, "The power to establish fire limits in the town of Greenville, and to prohibit the erection of wooden buildings therein, although not given by express terms, is by fair implication conferred on the town counsel by the charter. 1 Dillon on Municipal Corporations sec. 338."

If the building could have been repaired and was not as badly destroyed as to require to be rebuilt, and appellant desired to raise the question of the reasonableness of the ordinance as applied to this case, then there should have been a rejoinder and not a demurrer to the replication. We do not contend that a municipality can act unreasonably or with undue harshness, or that it could prevent slight repairs, that would not increase danger from fire, but that is not the case made by the replication, which shows that the house was so seriously damaged that to restore it to any use, it was necessary to rebuild. Counsel contends that an ordinance providing that a building in the fire limits damaged to the extent of twenty per cent of its value, cannot be repaired, is unreasonable and gives instances where such might be the case. We suppose in such cases the board would allow the necessary repairs and while we do not concede that the limit of twenty per cent is generally unreasonable, we insist that such is not the case here where we have a building damaged forty per cent and wholly unfit for the purpose of its construction or for any purpose whatever.

"The police power of municipal corporations to guard against unsafe buildings by ordering their demolition, will not be questioned and this exercise may be erroneous and the power may be abused, but it still exists, subject to judicial control and courts should not interfere with

it unless on very clear grounds." *Monteleone v. Ins. Co.*, 47 La. Ann. 1564.

The owner of the house herself could not and certainly the insurance company cannot bring the ordinance into question without bringing themselves within the limit complained of, in other words, if forty per cent is a reasonable limit and her property has been damaged to that extent, she cannot assail the law because the limit named in the ordinance might happen to be reasonable. *State v. Smylie*, 67 L. R. A. 903.

The court will see that the policy in question contains the provision that the company shall have the right to "repair, rebuild or replace the property lost or damaged with other of like kind and quality." The company under this provision had a right to undertake to rebuild the house in question and to litigate with the city and cannot now complain that appellees did not appeal from the order of the board denying her petition and refusing to allow her to rebuild.

Appellant assails the valued policy law of Mississippi as being violative if the Constitution of the United States, in that it impairs the obligation of a contract and denies it the equal protection of the law and deprives it of its liberty and property without due process of law, in half hearted sort of way, admitting "that this point has been decided against us in quite a few cases." We think this point has been absolutely settled against appellant's contention and that it is almost universally held by the courts, including the Supreme Court of the United States, that a state has the power to prevent the making of a contract within its borders by foreign corporations altogether, or it may impose such terms as it may deem expedient, provided they do not conflict with the exclusive power of congress. *Dagg v. Ins. Co.*, 35 L. R. A. 227; *Moses v. State*, 65 Miss. 56; *Paul v. Virginia*, 8 Wall 169; *Douglas v. Ins. Co.*, 94 U. S. 535; *Phil. Fire Assn. v. New York*, 119 U. S. 117; *Mining Co. v.*

Penn., 125 U. S. 187; *Ry. Co. v. Penn.*, 136 U. S. 118; *Ins. Co. v. Dagg*, 172 U. S. 561.

WHITFIELD, C.

The policy of insurance in this case contains this clause: "This company shall not be liable, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings." The insurance was for two thousand five hundred dollars. The property was worth about three thousand five hundred dollars. The damage inflicted by fire was about fourteen hundred dollars. The building was a frame building, within the fire limits of the city of Jackson. The insured was prohibited from reconstructing the building by the ordinances of the city governing the repair and construction of buildings within the said fire limits. It is thoroughly well settled that in such case, where the loss by fire is partial, but the injury by fire has rendered the building unfit for use for the purpose for which it was constructed, and there are ordinances or there is a law prohibiting its reconstruction, the loss in such cases is a total loss. This is very clearly set forth in the case of *Sandberg v. St. Paul & D. R. R. Co.*, 80 Minn. 442, 83 N. W. 411. Indeed, we do not understand the learned counsel for appellant to deny this proposition.

The exact contention of the insurance company is that it and the appellee, by the clause above quoted, expressly contracted that the appellant should not be liable, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, and the appellant tendered the amount of fourteen hundred dollars, which was the loss inflicted directly by fire. The sole question before us on this the only material contention in the case is whether or not this clause in the contract of insurance was written out by virtue of the provisions of our valued policy law.

Section 2592 of the Code of 1906. The question is not one at all free from difficulty, and we have given it the most careful consideration. The authority chiefly relied on by the learned counsel for appellant is the case of *Hewins v. London Assurance Corporation*, 184 Mass. 178, 68 N. E. 62, and that case clearly holds that the defense here would be good, the contract stipulation referred to being valid, in a state where there is no valued policy law substantially like ours. We do not think the statute of Massachusetts, which is claimed to be like ours, is so substantially, and for that reason we do not regard this authority as controlling in this case.

We have found one case, *New Orleans Real Estate Mortgage & Securities Company v. Teutonia Insurance Company of New Orleans*, to be found in 54 South. 466, which does squarely hold, on a valued policy law substantially like ours, though not identical in its phraseology, that the very clause here relied on, to-wit, for loss occasioned by ordinance or law regulating construction or repair of buildings, is written out of the policy by the valued policy law of Louisiana. While the court does say, in its original opinion, that it did not wish to be understood as holding that the exemption from the liability clause in question was not inconsistent with the valued policy law of Louisiana, and that it expressed no opinion on that point, we do not well see how the judgment in the case could have been what it was, without holding that it was so inconsistent; and, indeed, this is made clear in the judgment rendered by the court on rehearing, in which, at the foot of page 469, the court does meet the issue squarely, and expressly holds that the valued policy law did write the exemption clause out of the policy, and that the statute so writing it out was one affecting the public policy of the state.

After the maturest thought we can give the matter, we are constrained to follow this decision of the supreme court of Louisiana, and hold that the clause of exemption

Brief for appellant.

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from liability, relied on in the policy before us, was written out by our valued policy law referred to above.
Affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated, the judgment of the court below is affirmed.

VIRGINIA-CAROLINA CHEMICAL COMPANY v. W. T. STEEN.

[55 South. 47.]

1. COLLECTION OF NOTE. *Agency.*

Where the maker contracted to pay his note at a bank in Memphis, and the payee without consideration and for the convenience of the maker and at his request, forwarded the note for collection to a bank at the home of the maker, the latter bank was the agent of the maker and not of the payee and a payment to it did not discharge the note until the funds were transmitted to the payee.

2. SAME.

Where one of two parties must suffer a loss from the act of an unfaithful agent, it is proper that that party should be the loser who for the purpose alone of serving his own ends, was the cause of the selection of the unfaithful agent.

APPEAL from the circuit court of Alcorn county.

HON. JNO. H. MITCHELL, Judge.

Suit by the Virginia-Carolina Chemical Company against W. T. Steen. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

W. J. Lamb, for appellant.

We contend that the Tishomingo Savings Institution was the agent of Steen. It is contended with equally as

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Brief for appellant.

much force by appellee that the bank was the agent of appellant. Now, the note was sent to the bank at Steen's request, when he knew that it was made payable at the bank in Memphis. Because Steen kept a deposit in this bank and deposited money there, as he claims, for the purpose of paying off this note, and because the bank failed without remitting the money for the note, can Steen then repudiate this act on his part, thereby making appellant the loser because of its having done so for the convenience and benefit of Steen and not the appellant? This being the case, we respectfully submit to the court that the Tishomingo Savings Institution was the agent of Steen and therefore Steen must stand the loss for he made the selection himself.

In the case of *Crane v. Bedwell et al.*, 25 Miss. 512, the court said:

"The payment therefore made to Lee in this case does not bind the plaintiff and is no satisfaction of the judgment unless it was received by the direction and consent of the plaintiff."

This doctrine, we contend, is applicable to the case at bar. If the appellant had selected the Tishomingo Savings Institution as its agent and had sent the note there for collection without any request on the part of Steen, then, of course, Steen would be discharged and the debt paid so far as he is concerned when the money was paid to the bank. But this is not the facts in the case at bar. In the case at bar, the note was payable at the State National Bank at Memphis; and, before the note was due, Steen wrote the appellant to send the note to the Tishomingo Savings Institution so he could pay it, and as was said in the case of *Oil Co. v. Weathersford*, 91 Miss. 504:

When the payment was made to the sheriff he was simply the agent of Weathersford, and, if he did not pay it over, Weathersford must look to him for it.

Now, we submit to the court that this is the principle applicable to the case at bar. The Tishomingo Savings Institution, under the facts in this case, is simply the agent of Steen and when Steen paid the money to the bank for the purpose of paying the note and the bank failed to remit the money, Steen still owes the note to the appellant and Steen will have to look to the bank for his money.

There can be no strained principle of law involved in this controversy. It is purely a question of whether or not Steen will be bound by his acts, although he may suffer loss because of having unwisely selected the wrong person with whom to deposit his money. Steen had a right to select any person as his agent whom he desired. He was doing his banking with the Tishomingo Savings Institution, and it was more convenient for him that this note be sent for collection to the bank with which he did business; and, when he directed this note to be sent to this bank for collection, he thereby made the bank his implied agent. There is no form necessary by which a principle may designate his agent.

In Cyc., vol. 31, p. 1227, the text says, as follows: "In general, no written instrument of particular form of words is necessary to constitute the relation of principal and agent. For most purposes, the agent's authority need not even be express, but if it is express, oral authority is sufficient."

We submit to the court under the facts in this case that when Steen directed the appellant to send this note to the bank, he created the bank his agent as a matter of law for this transaction at least.

In Cyc., vol. 31, p. 1217, the court will find the following: "The relation of principal and agent does not depend upon an express appointment and acceptance thereof, but it may be implied from the words and conduct of the parties and the circumstances of the case. It is often difficult to determine upon general principles

whether any agency exists; rather it must be determined from the facts and circumstances of the particular case. And if, in view of the facts, an implied agency is apparent, its extent is limited to the acts of a like kind with those from which it is implied, and is to be restricted to the purpose for which the facts show that it was granted."

It often arises that it is hard to determine whose agent the representative has been when two or more parties are involved, and in Cyc., vol. 31, p. 1221, we have the following:

"When agency is shown, it is often difficult to determine, as between two or more parties involved, whose agent the representative has been in the transaction. The question in such case is, as between two parties who sustain relations to the agent, which of them under all the circumstances and conditions of the case it is fair to conclude appointed him and controlled his acts and the tenure of his employment." *Evans v. Pierce*, 70 Ill. App. 457; *Brainard v. Turner*, 4 Ill. App. 61; Cyc., vol. 31, p. 1235; *Hackett v. Van Frank*, 105 Mo. App. 384-385; Cyc., vol. 31, p. 1239; *St. Paul National Bank v. Cannon*, vol. 24, Am. St. Rep. 192; *Wood v. Merchants' Savings Co.*, 44 Ill. 567; *Adams v. Hackensack Improvement Co.*, 43 Am. Rep. 410; *Ward v. Smith*, 7 Wall. 447.

Candler & Candler, for appellee.

The court refused to give the 2d and 3d charges asked by plaintiff which was eminently correct; and the asking of these charges indicated that appellant had swung loose from the real testimony and the law and was asking a verdict not according to the material facts. The charges asked and given by the court for appellee recited facts claimed to have been proven, and asked for a response as to their correctness from the jury which by its verdict found the alleged facts to be true and under

the law as given, found for appellee, and judgment was rendered in accordance therewith. There is no contention in the brief of counsel for appellant that these charges for appellee were not the law, and we think it unnecessary to cite any authorities to sustain them, and we submit that all the authorities cited by appellant do not affect nor change the law as given in the charges for appellee in the court below, and that the question was fairly submitted to the jury upon the law and the facts and a judgment rendered for plaintiff in the court below which should be affirmed.

ANDERSON, J., delivered the opinion of the court.

Appellant, the Virginia Carolina Chemical Company, sued appellee, W. T. Steen, on a promissory note for two hundred and five dollars. There was a judgment in the court below for appellee, from which appellant appeals.

The controlling facts in the case, which are undisputed, are as follows: The appellee, who resided in Alcorn county, on May 17, 1907, executed his promissory note to appellant for two hundred and five dollars, due November 1, 1907, with interest from maturity at the rate of eight per cent, per annum, payable at the State National Bank in Memphis, Tennessee, in which city appellant had an office through which it conducted its business for the territory of which Northern Mississippi is a part. A short time before the note became due, at the request of appellee, who did his banking business with the Tishomingo Savings Institution, at Corinth, in Alcorn county, the appellant forwarded the note to that bank for collection, and appellee was notified to that effect. After the note became due the appellee turned over to the Tishomingo Savings Institution a sufficient amount of money to pay the note, and on doing so received from the bank his note. Without having forwarded the collection thus made to the appellant, the Tishomingo Savings Institu-

tion failed in business, and appellant has never received from it the money so paid. Appellant thereupon brought this suit on the note, claiming that the payment made by appellee to the Tishomingo Savings Institution did not discharge the note; that in the collection of the note that bank was acting as the agent of appellee, and not of appellant. On the other hand, appellee contends that, under the facts stated, the payment by him to the Tishomingo Savings Institution was a payment to the agent of appellant, and therefore discharged the note. The court below refused, at the request of appellant, to instruct the jury to return a verdict in its favor, and this action of the court is assigned as error.

The question in the case is whether, in making collection of this note, the Tishomingo Savings Institution acted as the agent of appellee or of appellant; for it is undoubtedly the law that if it acted as the agent of the latter the note has been paid, and if of the former it has not been paid. By the terms of the note it was payable to the appellant at the State National Bank in the city of Memphis. By virtue of this stipulation in the contract the appellee agreed to pay the note there, and not somewhere else, and appellant was entitled to have payment made there, and not at some other place. For the convenience of appellee alone, and at his request, the note was forwarded to the Tishomingo Savings Institution for collection. In so forwarding the note for collection, appellant was serving the interest of appellee, and not its own. There was no advantage or consideration moving to appellant which induced it to so forward the note for collection. There was no reason why appellant should waive the stipulation in the note providing for its payment in Memphis. It is true appellant, at the request of appellee, trusted the Tishomingo Savings Institution with the custody of the note, and authorized its delivery to appellee when paid; but, looking through the form to the meaning of the transaction, such pay-

ment and delivery up of the note was not to be absolute until the money was paid to the appellant at the stipulated place of payment in the city of Memphis. Taking the whole transaction, it amounts to this: Appellee contracted to pay the note at the State National Bank at Memphis; but for the convenience of appellee, at his request, the note was forwarded to the Tishomingo Savings Institution, as the agent of appellee, to receive from him the amount due on the note and forward the money to appellant at the place of payment in the city of Memphis provided for in the note. The appellant did not waive its right to have the note paid there. It was not asked to waive this right. It had no interest to serve by waiving the same. Appellant only acquiesced in appellee's selection of the Tishomingo Savings Institution as his agent to receive the amount due on the note and forward same for him. Such acquiescence did not constitute the bank so making the collection the agent of the appellant.

On account of the insolvency of the Tishomingo Savings Institution, one or the other of the parties to this suit must lose the amount of this note. Shall it be the appellant, whose only fault was in trying to accommodate the appellee, if that may be called a fault; or shall it be the appellee, who, for the purpose alone of serving his own ends, was the cause of the selection of the unfaithful agent? We answer, the latter. It follows, from these views, that the peremptory instruction requested on behalf of appellant should have been given.

Reversed and remanded.

SMITH, J. (dissenting). I think that the Tishomingo Savings Institution was constituted, by appellant, its agent in the collection of the note and, consequently, appellee was discharged when he paid the amount due on this note to the Tishomingo Savings Institution. It is true that appellant appointed the Tishomingo Sav-

ings Institution its agent at the request of appellee, but as no fraud or deceit on the part of appellee was shown, this fact cannot, in my judgment, alter the situation of the parties.

**L. L. BANKSTON v. ALBERT COOPWOOD, EXECUTOR, ESTATE
OF T. D. COOPWOOD, DECEASED.**

[55 South. 48.]

1. CLAIMS AGAINST ESTATE OF DECEDENT. Proof. Code 1906, section 2106.

Under Code 1906, section 2106, requiring any person desiring to probate his claim against the estate of a decedent to present to the clerk a statement of his claim in writing signed by the creditor and to make affidavit to be attached thereto; a statement of the claim of the creditor with an affidavit of the creditor signed by the creditor attached thereto is sufficient, the purpose of the statute being to identify it and verify its correctness.

2. SAME.

A substantial and not a literal compliance with the statute is all that is required.

APPEAL from the circuit court of Tunica county.

HON. M. E. DENTON, Chancellor.

Proceedings to establish by L. L. Bankston, a claim against the estate of T. D. Coopwood, deceased. From a judgment in favor of Albert Coopwood, executor, claimant appeals.

The facts are fully stated in the opinion of the court.

W. L. Bankston, for appellant.

The single question presented by this appeal is whether the omission of Dr. L. L. Bankston to sign the

account would invalidate and preclude recovery of the debt. There was no contest of the justice of the claim made by the representative of the estate, nor by any distributee, heir or creditor, and it is proved as provided by Code, sec. 2108. The clerk approved, allowed and registered the claim.

We submit that the claim was properly presented to the clerk in an itemized account, signed by the creditor, and sworn to by the creditor in strict compliance with Code, sec. 2106. The affidavit is a part of the probated account and the signing and swearing to same by the creditor is signing and swearing to the account as contemplated by last named section. This statute does not say and certainly does not mean that an account has to be signed. It says, "if there be no written evidence thereof, an itemized account or a statement of the claim is writing, signed by the creditor, and make affidavit, to be attached thereto." So it is very clear that the legislature said and meant to say that the statement should be signed, and not the account, but that the prescribed affidavit signed and sworn to would be sufficient.

It was agreed in the court below by appellee's attorney that if Dr. L. L. Bankston had written his account in his own hand writing instead of using a printed bill head thus writing his name in the caption of the account that then he would have complied with the statute. This construction would render the law a perfect farce, and it would be unreasonable, unjust and exceedingly technical, and we cannot believe that this statute will be given such hair splitting technical construction thus defeating honest, just and undisputed claims.

We submit that the order of the court disallowing this claim should be reversed.

J. T. Lowe, for appellee.

We insist that the learned chancellor below was correct in his holding in this cause, in which he followed

the plain terms and provisions of the statute, section 2106 of the Code of 1906, which are in words as follows: to-wit: (We copy the essential parts.)

“Any person desiring to probate his claim shall present to the clerk the written evidence thereof
.....an itemized account, or statement of the claim in writing, signed by the creditor, and make affidavit, to be attached thereto, etc., etc.

The appellant presented to the clerk his itemized account, but he did not sign the itemized account. He made the affidavit to be attached thereto, said affidavit made as required by the statute, etc., and he did attach said affidavit thereto in the usual way, by pasting and appending it to the account, but as aforesaid, he failed to sign the said itemized account. In this he failed to comply with the strict requirements of the statute, which was fatal to his cause, and so held and decided by the learned chancellor below.

Strictly in line with our contention, is the case of *Walker v. Nelson, Executor*, 87 Miss. 268, citing *McWorter's case*, 39 Miss. 779, and the case of *Cheairs*, 81 Miss. 662. All three of said cases hold that said statute must be strictly followed, and that any deviation therefrom, or omission, will be fatal to him, who attempts to establish a claim against a decedent's estate. The reason of the rule, is apparent.

ANDERSON, J., delivered the opinion of the court.

Albert Coopwood, the appellee, as executor of the will of T. D. Coopwood, deceased, was administering the estate of said decedent in the chancery court of Tunica county. The appellant, Dr. L. L. Bankston, having a claim against said estate of two hundred and fifty-two dollars and forty cents, for medical services, on June 6, 1910, attempted to probate his claim. The claim was properly itemized, and had attached to it the affidavit in due form provided for by the statute, signed by the ap-

pellant; but the itemized account itself was not signed by him. The court below held that the failure of the appellant to sign the itemized account rendered void the probation of the claim. It is contended on behalf of the appellant that the signing by him of the affidavit attached to the account was a sufficient signing of the account itself, and amounted to a substantial compliance with the statute.

Section 2106 of the Code of 1906 provides: "Any person desiring to probate his claim shall present to the clerk the written evidence thereof, if any, or, if the claim be a judgment or decree, a duly certified copy thereof, or, if there be no written evidence thereof, an itemized account, or a statement of the claim in writing, signed by the creditor, and make affidavit, to be attached thereto, to the following effect, viz., . . ." To sustain his position, the appellee relies on the case of *Walker v. Nelson*, 87 Miss. 268, 39 South. 809. In that case the court said: "The itemized account attempted to be probated against the estate of the decedent was not signed by the creditor, nor was there any affidavit attached thereto." We have examined the original record in that case, and find that the creditor signed neither the account nor the affidavit attached thereto. That case, therefore, is not authority for the contention here made that a signing of the statutory affidavit attached to the account is not a sufficient signing of the account. Such a contention was not presented to the court, and the language used by the court in that case was addressed to the particular facts of the case. A substantial, and not a literal, compliance with the statute is required. "A statement of the claim in writing signed by the creditor" is necessary under the statute; but a signing by the creditor of the affidavit is a substantial compliance with this requirement. The affidavit is attached to the account, and is a part of it. The purpose of the statute in requiring the claim to be signed is to identify it and

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Brief for appellant.

verify its correctness. A signing of the affidavit attached to the claim is necessarily a signing of the claim itself in the sense of the statute. The statute does not point out any particular place where the claim shall be signed.

Reversed and remanded.

ILLINOIS CENTRAL RAILROAD COMPANY v. JAKE WEINSTEIN.

[55 South. 48.]

TRIAL. Improper argument. Instructions.

Where in the argument of a close case upon the facts, the counsel for plaintiff in commenting on the facts of defendant's failure to produce certain witnesses on the stand said, over defendant's objection, that the fact that defendant had not brought certain witnesses raised the reasonable inference that defendant believed that if such witnesses were present they would testify in favor of plaintiff, and thereupon defendant asked an instruction that the jury could not presume that any person not present would testify against defendant and that defendant was no more bound to produce such witnesses than plaintiff. *Held*, that the refusal of this instruction and the refusal of the court to prevent the improper argument of counsel was reversible error.

APPEAL from the circuit court of Tallahatchie county.
HON. SAM C. COOK, Judge.

Suit by Jake Weinstein against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Stone & Gary and *Mayes & Longstreet*, for appellant.

Instruction No. 11 asked by the defendant and refused by the court, was warranted by statements of counsel

for plaintiff excepted to by defendant by special bill of exceptions, and the rule of law announced in this instruction was the correct rule applicable to the objectionable remarks made by counsel and this instruction should have been granted.

Tim E. Cooper, for appellee.

The 11th instruction, refused, was properly refused. The evidence showed that the plaintiff was a stranger to the persons on the train and the railroad conductor took the names of certain of these persons as witnesses to the occurrence. Certainly, if the railroad company had the names of the witnesses and the plaintiff did not, it is not true that plaintiff was under the same obligation to produce the witnesses, or that the jury might, or might not, infer unfavorable testimony to the plaintiff, if they were not produced.

This was a question which should have been left to the jury. What is meant by the obligation to produce the witness, is simply this: that if a witness known to a party is not produced, the jury may, or may not, infer, according to circumstances, that the witness was not produced because his testimony would be unfavorable to the party. And when the court tells the jury that no greater obligation rests on the defendant than on the plaintiff, it assumed to settle this question of fact and thus invades the province of the jury.

It is submitted that on the whole case, the verdict is supported by the evidence; that there are no errors of law and that the judgment should be affirmed.

McLAIN, C.

This is an appeal from the circuit court of the First district of Tallahatchie county, from a judgment in favor of appellee. Weinstein, against appellant, the railroad company, for alleged personal injuries inflicted upon appellee by appellant, the railroad company.

Upon the trial of this cause, appellant presented the following special bill of exceptions: "Counsel for the plaintiff, in closing the argument in this cause, said to the jury that the conductor at the time of the accident took the names of the persons present, of Vaiden and others, and that it had failed to bring them to court when it could issue them free passes, and that the reason of this was because they thought they would testify unfavorably for the defendant, and would support the plaintiff. Counsel for the defendant objected to the statement of counsel, and the court made no ruling on the objection, and defendant excepted thereto. Defendant asked and obtained the following charge: 'The court charges the jury, in this case, from the evidence before you, you should not indulge any unfavorable presumption against the defendant on account of the absence of witness Vaiden, and have no right to indulge the presumption that defendant knew or believed he would testify something favorable to the plaintiff. The jury should only consider the statement of Vaiden as set out in the written statement, and should consider that just as if Vaiden was present and testifying to it before the jury'—and passed it to counsel, who read it and said he did not mean Vaiden, but the other parties whose names were taken by the conductor, and that he would repeat that the fact that the railroad company had not brought these other persons it was reasonable to infer was because it believed they would support the plaintiff, that that was what he meant to say, and that he would repeat the same. Thereupon counsel for the defendant asked the following charge: 'The court charges the jury that they have no right to presume any person who is not present and testifying would give evidence unfavorable to the railroad company, and no greater obligation rests on the defendant to bring such person than rests on the plaintiff. The jury must try this case on the evidence before them, and not on something that

either they or counsel may imagine some absent person might testify—which the court refused to give, and the defendant excepted to the action of the court in both refusing the said charge and declining to stop counsel, or ruling out his remarks, as above set out, and now tenders his special exceptions.”

This instruction was warranted only by the statements of counsel for plaintiff, and the rule of law announced therein was the correct rule applicable to the facts and to the objectionable remarks of counsel, and the instruction, under the facts as disclosed by this special bill of exceptions, should have been granted. The parties, whose absence was commented upon by counsel for plaintiff, were equally accessible to plaintiff and defendant, so far as the record discloses.

The refusal of the court, under the circumstances as detailed in this special bill of exceptions, to stop or admonish counsel for his remarks, followed immediately by the refusal of this instruction, all in the presence of the jury, was prejudicial to the rights of the defendant. This being, in our opinion, a close case on the facts, we are unwilling to affirm that no injury was done appellant by the comments of counsel and the ruling of the court as above set out.

We think the case should be reversed. We do not pass upon any other assignment of errors contained in the record.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated by the Commissioner, the case is reversed and remanded.

SOUTHERN RAILWAY CO. IN MISS. v. S. A. FLOYD.

[55 South. 287.]

1. NEGLIGENCE. *Railroads. Blocking highway. Proximate cause. Instructions.*

When the facts of a given case are undisputed and the inferences or conclusion to be drawn therefrom are indisputable, when the standard of duty is fixed and defined so that a failure to attain it, is negligence beyond cavil, then contributory negligence is a matter of law.

2. PROXIMATE CAUSE OF INJURY. *Last clear chance.*

If the sole immediate cause of the injury was the defendant's negligence, the plaintiff can recover, notwithstanding previous negligence of his own.

3. CONTRIBUTORY NEGLIGENCE.

Where plaintiff on his way home at night found the public road blocked by freight cars standing on the railroad track that passed over the public road, the cars extending about fifty feet on either side of the crossing and having no engine attached thereto, the cars remaining there all night and a part of next day: And plaintiff dismounted from his horse and went around one end of the cars to get into the road on the other side and in going around, just before he got back into the public road fell into a hole and was injured. His act in so doing was not contributory negligence *per se*.

4. QUESTION FOR THE JURY.

Where the facts are conceded, but the inferences in regard to negligence is doubtful, depending upon the general knowledge and experience of men, it is a question for the jury.

5. PROXIMATE CAUSE.

Where the injury to plaintiff was directly traceable to the negligent obstruction of a highway by the defendant railroad company such obstruction was the proximate cause of the injury.

6. INSTRUCTIONS.

It is a mere matter of form that an instruction reads: "If the plaintiff has shown by the evidence," etc., instead of the usual way that, "If the jury believe from the evidence."

APPEAL from the circuit court of Carroll county.

HON. G. A. McLEAN, Judge.

Suit by S. A. Floyd against the Southern Railway Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Catching & Catching, for appellant.

Contributory negligence is so clearly made out that the court ought to have instructed the jury to find for the appellant.

In *Corcoran v. St. Louis, I. M. & S. R. Co.*, 16 S. W. 413, the supreme court of Missouri said:

"Whether in any particular case the plaintiff was guilty of contributory negligence is generally a question of fact for the determination of a jury, but when no other inference than that of negligence can be fairly and reasonably drawn from the evidence, as in this case, it should be declared as a matter of law."

This court has held that where the evidence and inferences therefrom make it clear that plaintiff's negligence produced the injury, or contributed as the proximate cause thereof, it is proper to direct a verdict for defendant. *McCurty v. Railroad*, 67 Miss. 601; *Railroad Co. v. Mason*, 51 Miss. 234.

The court gave this instruction for the appellee:

"The court instructs the jury in this case, if the plaintiff has shown by evidence that the public highway or road crossing at Malmaison which is alleged to have been obstructed by defendant leaving cars over said crossing was a "highway," "public road," that the plaintiff himself was detained by said obstruction for a longer period than five minutes, and that the detention or obstruction caused the injury complained of, then the defendant is liable for all damages sustained as consequence of the carelessness and negligence of their agents or servants in obstructing the said crossing."

We submit that no argument should be required to show that this instruction is manifestly erroneous, and that it could not have failed to make the jury believe that in order that the plaintiff might recover it was only necessary for him to show that the highway had been obstructed for a longer period of time than five minutes, and that the appellee was injured. The effect of the instruction was to inform the jury that if they believed these two things the plaintiff was entitled to recover.

It wholly omits all reference to the question as to whether the obstruction was the proximate cause of the injury. In *Cooley on Torts*, page 6, it is said:

"If the wrong and the resulting damages are not known by common experience to be natural and usual in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

This test, we think, is supported by the authorities without exception. In 29 Cyc. 492 it is said:

"To constitute proximate cause creating liability for negligence the injury must have been the natural and probable consequence of a negligent act. It is the cause which naturally produces a given result. The negligence must be such that by the usual course of events it would result in injury unless independent moral agencies intervene in the particular injury."

Again on page 496 it is said:

"A prior and remote cause cannot be made the basis of an action, if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury. If no danger existed in the condition except

because of the independent cause such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances which, because of the prior defective condition results in injury, such subsequent act or condition is the proximate cause. But where the condition was such that the injury might have been anticipated, it will be the proximate cause notwithstanding the intervening agency, or where such condition rendered it impossible to avoid injury from another contributing cause."

Applying the law as thus laid down it is impossible to say that the mere fact that the highway was obstructed was the cause of the injury. There was no negligence on the part of the appellant in creating the hole into which the appellee fell, or in allowing it to remain. It was upon its right of way and apparently, according to the testimony, had been created as the result of throwing up earth from its right of way on to its railroad embankment. The only negligence, therefore, was the obstruction of the highway. How can it be said that by common experience and as a natural sequence this obstruction would have resulted in the appellee falling into this hole and sustaining the injuries complained of? How can it be said that the damage, according to the ordinary course of events, followed from the obstruction. The obstruction did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible. That is to say, the obstruction gave rise to the occasion by which the appellee attempted to pass around the obstruction and get back into the highway. It could not possibly have been anticipated as the probable result of this obstruction that the appellee, in attempting to evade the obstruction, would pursue the course he did, of attempting on a dark and cloudy night to travel along these railroad tracks and step off into a hole.

The case of *V. & M. R. Co. v. Alexander*, 62 Miss. 499, clearly illustrates what is meant by proximate cause. In that case the train of the railway company was left for about an hour, with a part of it extending three and a half feet into the street, at a crossing. The court said:

“It was improper to thus partially obstruct the crossing, and for any damage directly traceable to this wrong of the appellant it is unanswerable.”

That position is undoubtedly correct. It was equivalent to saying that the railway company was not liable for any damage which was not directly traceable to the obstruction. Under the facts of that case the plaintiff was held not guilty of contributory negligence, and clearly he was not so guilty. The injury complained of was held to be directly connected with the obstruction, and therefore it was held that the obstruction was the proximate cause of the injury. In this case, however, the injury which the appellee sustained is not directly traceable to the obstruction of the highway at Malmanson.

But the instruction is fatally defective in another particular. The jury are told that “if the plaintiff has shown by evidence” that the highway was obstructed, that the plaintiff was detained by the obstruction, and that this obstruction caused the injury, the appellant must be found liable. They are not told that they must believe from the evidence that these things happened; they are simply told that it is sufficient to make the defendant liable if the plaintiff has shown by evidence that these things happened. The plaintiff undoubtedly has shown by evidence that the highway was obstructed, that he was detained by the obstruction, but even if it could be inferred that this obstruction caused the injury complained of, the instruction is defective because the jury are not required by it to believe that these things have been established by the evidence. Under this in-

struction, although the jury might have believed that the evidence introduced by the appellee was false, yet they are required to find the appellant liable because the appellant has shown by evidence. In other words, the jury are not required by the instruction to believe from the evidence, but they are required to find the defendant liable if there is evidence showing the things recited, although they might totally disbelieve this evidence. The words "if the plaintiff has shown by evidence" and not at all equivalent to the words "if the jury believe from the evidence." The distinction between the two expressions is clear and distinct. If for no other reason, therefore, this case must be reversed.

M. B. Grace, for appellee.

We submit no argument is necessary here to show that the plaintiff in the court below was not guilty of contributory negligence *per se*. The record conclusively shows that he exercised all the care, caution and prudence any ordinarily careful and prudent man would have exercised under the same circumstances. He says, "he was acquainted with the premises and of the railroad tracks at this place, and, to take the precautionary measure to prevent injury, he crossed over the side track and main line and to a place where he thought he was safe." His actions at that time seem to indicate that he knew there was a low place near where the highway crosses the railway tracks, and was trying to avoid falling into it, was the reason he crossed over all the tracks at the particular point he did. There was nothing apparently about the premises which indicated to him he would probably be injured by going around the cars and getting into the highway.

A further precautionary measure taken and adopted by the plaintiff in the court below was, instead of riding his horse or mule around the cars, he "cooned" carefully his way around the cars leading the animal. Mark

you, the hole which he fell into was dug there the day of the accident, or, about that time. See S. I. Donley's testimony. It is said, "The unlawful or unreasonable obstruction of a highway is a public nuisance, and any one injured, or, who sustains damages as a consequence of such obstruction, may maintain a civil suit for damages sustained as a consequence of such negligence, or obstruction. A traveler has the right to expect, and presume that a public highway crossing over a railroad track, or tracks, will be kept open to the traveling public, and, not be blocked by the railroad company leaving a string of freight cars standing over and upon the crossing, and no engine attached to them, and all night. *A. & V. R. Co. v. Alexander*, 62 Miss. 496.

It is no defense that the person injured might have taken another road which was safe. It is no defense that this plaintiff might have kept on the same side of the railroad tracks his horse was hitched upon, and gone to another road, if there was one in the country, and gone another way or route to his home. In fact, there was no other crossing near this one, and the record is silent as to where the next crossing is. *Stewart v. Havens*, 17 Neb. 211.

Plaintiff in the court below was not responsible for the night being dark and cloudy. Since it was dark and cloudy, he exercised all the care, caution and prudence possible in, first ascertaining if there was a locomotive engine attached to the cars, and, next, in leading his horse around the cars, walking himself. Where the laws of necessity forces a party to do, or not to do certain things, if he uses ordinary care in doing them, he is not guilty of contributory negligence *per se*.

The question as to whether appellee was guilty of such contributory negligence as would bar a recovery was a question for the jury and not for the court. It is a question of fact, and for the jury, where fair-minded men might draw different conclusions from undisputed

facts. Vol. 1, Thompson on Negligence, sec. 429; *Penn. etc., R. R. Co. v. Righter*, 42 N. J. L. 180, 183.

Where the contributory negligence of the party injured is relied upon to defeat a recovery, the evidence must show conclusively that the plaintiff or party injured was guilty of contributory negligence *per se*. In other words, his negligence must amount to an utter disregard for his own safety. His failure to take great care is no defense to the action. *Shearm & Red.*, on Negligence, sec. 29; also foot notes and authorities, sec. 29.

Some risk is always taken by the most careful and prudent men. The plaintiff is not barred if he adopted the way, course or route most prudent men would have adopted under similar circumstances, and the court very properly refused the affirmative charge requested by defendant. *Shearm & Red.*, on Neg., secs. 30-31; foot notes to section 31.

Contributory negligence is always a question for the jury, unless, it affirmatively is shown by the evidence that the plaintiff was guilty of contributory negligence *per se*, and it amounts to utter disregard to his own safety. *Girdudi v. Electric Improv. Co.*, 107 Cal. 120, 28 L. R. A. 596; *R. R. Co. v. Mason*, 51 Miss. 234; *R. R. Co. v. Davis*, 69 Miss. 444; *Railway Co. v. Lowe*, 73 Miss. 203; *Fuller v. R. R. Co.*, 68 Miss. 355; *McGowan v. R. R. Co.*, 62 Miss. 682; *R. R. Co. v. Hirsch*, 69 Miss. 126.

Further, on this question, we respectfully invite the attention of the court to the opinion of the court in the case of *Owens v. Yazoo & M. V. R. R. Co.*, 94 Miss. 378, in latter part of opinion of court, 47 South. 518; *Bell v. Southern Railway Company*, 87 Miss. 234, 30 South. 821.

The hole plaintiff fell into and was injured is forty feet, more or less, west of the highway at Malmaison. The court well sees he was endeavoring to shun the low place near the highway when he crossed to the south side of the main line immediately after passing around the west end of the cars.

INSTRUCTIONS.

Counsel for appellant seems to find fault with instruction No. 3 requested by the appellee and given by the court below. He says, it is objectionable for two reasons. His argument fails of itself. It is correct and is as follows:

"The court instructs the jury in this case, if the plaintiff has shown by evidence that the public highway or road crossing at Malmaison which is alleged to have been obstructed by defendant leaving cars over said crossing, was a "highway," "a public road," that the plaintiff himself was detained by said obstruction for a longer period than five minutes, and that the detention or obstruction caused the injury complained of, then the defendant is liable for all damages sustained as a consequence of the carelessness and negligence of their agents or servants in obstructing the said crossing."

The instruction meets every objection urged to it by counsel for appellant. He says, "the instruction is faulty because it tells the jury, 'if the plaintiff has shown by evidence that so and so was the case' the defendant is liable for all damages sustained." their contention is, the instruction should have read, "if the jury believes from the evidence and etc." If the jury had not believed the evidence, they certainly would never have returned a verdict for the plaintiff. This objection is merely to the form, and not the substance of the instruction. Had the instruction told the jury, if they believe from the evidence, or if the plaintiff has shown by the evidence, that the highway was obstructed by defendant's cars, and that same is a highway, and stopped at this point, it would not have made sense. It must go further and show that the injury or damage was a direct consequence of the crossing or highway being obstructed, or, it must go further and tell the jury that the injury or damage must be a consequence of the crossing

being obstructed by the appellant's freight cars, and this is exactly what this instruction does.

What is the office of an instruction? What is the object of an instruction? Hughes on instructions says the object of an instruction is as follows:

"The object of an instruction is to inform the jury what are the precise principles or rules of law applicable to the evidence in the case, and explain the issues that the jury may have a clear understanding of their duty in reaching a verdict. Instructions should therefore be clear and simple, and consist of a plain statement of the law applicable to the evidence or facts in the case; and they should be couched in such terms as they may be readily understood by ordinary men acting as jurors." *Moore v. Rayland*, 58 Kansas 250.

If it was slight error in drawing the instruction to read, "if the plaintiff has shown by evidence and etc.," we submit same was cured by instruction No. 3 requested by the appellant and given by the court.

"The court charges the jury that they are the sole judges of the credibility of witnesses and they may believe or disbelieve the testimony of any witness as their conscience may dictate, and if the jury believe any witness has testified to anything as a fact which is intrinsically impossible, they may disregard the testimony of such witness altogether, if they see proper."

This instruction told the jury they may disbelieve the evidence of any witness if they thought he had testified falsely to any fact; that they were the judges of the credibility of all witnesses, etc., and they had the right and power to disregard the evidence of any or all of the witnesses for the plaintiff. The case of *A. & V. R. R. Co., v. Alexander*, 62 Miss. 499, bears out our contention.

If the railroad company had not blocked and obstructed the highway at Malmaison, which is a country road crossing, the plaintiff would never have gone, or attempted to go round the cars, and would not have been

injured by falling into the hole. Then what was the proximate cause of the injury? Was it not the blocking of the crossing? This is exactly what caused him to attempt to go around the cars and try to get back to his home that night.

This instruction was drawn as nearly as possible from the opinion of the court in the case of *Anderson v. R. R. Co.*, 81 Miss 587. The burden of proof was upon the appellee to prove all that was recited in the instruction, and had he failed in any particular, his case was not made out.

Argued orally by *M. B. Grace*, for appellee.

MCLAIN, C.

This is an appeal from the circuit court of Carroll county by the Southern Railway Company from a judgment of three thousand, three hundred and fifty dollars rendered against it in favor of S. A. Floyd for injuries alleged to have been received by him by reason of the appellant having blocked with its cars the public road crossing at Malmaison.

We will first give the leading facts. Malmaison is a small railroad station on appellant's railway line. At this point its road runs east and west. The side track or switch lies and runs parallel to the main line, immediately north of it. The public road is crossed by the main line and side track at this point. The appellee lives several miles south of Malmaison. Appellee, on arriving in the village, some hours prior to the unfortunate accident, hitched his horse just north of appellant's railroad track. Desiring to return to his home, about 8 or 9 o'clock at night, appellee found the public road blocked by freight cars standing upon the track that passed over the public road, and the freight cars extended from this point, both east and west, some fifty or sixty feet. These cars remained in that position the balance of that night

and a part of the next day. Appellee, discovering that there was no engine attached to either end of these cars, and the surrounding circumstances seeming to have suggested to him that they would thus remain for some time, dismounted from his horse and walked west (leading his horse) by the side of these cars. When he arrived at the end of these freight cars, he turned south, passing over the side track to the main line, and then turned east, walking on the main line, with the intention of reaching the public road. After reaching a point within fifteen or twenty feet of the public road, he stepped off the main track into a hole, which he says was about two or three feet deep and about six feet wide. In the fall he struck against a cross-tie, and received the injuries complained of in his declaration. The nature and extent of these injuries we will not set forth, as we think the jury was warranted in its finding. Appellee claims that, when he fell into the hole, he did not see it on account of the extreme darkness of the night. It is alleged that this hole was made, just before this accident, by appellant getting dirt to place upon its track. There is some dispute as to the size and depth of this hole. The night on which this accident happened was cloudy and very dark. It appears from the record that appellee was well acquainted with the premises and railroad tracks at this place.

These are the leading facts. Upon the trial the court gave the plaintiff this instruction: "The court instructs the jury in this case, if the plaintiff has shown by evidence that the public highway or road crossing at Malmaison, which is alleged to have been obstructed by defendant, leaving cars over said crossing, was 'a highway, a public road, that the plaintiff himself was detained by said obstruction for a longer period than five minutes, and that the detention or obstruction caused the injury complained of, then the defendant is liable for all damages sustained as a consequence of the carelessness and

negligence of their agents or servants in obstructing the said crossing."

The counsel for appellant insists with much earnestness and skill that appellant was entitled, under the facts in this case, to a peremptory instruction; and he further contends, if he is mistaken in that, that the above instruction is manifestly erroneous, and, if for no other reason, the case should be reversed. "When the evidence neither proves nor tends to prove liability on the part of a defendant, or where the facts shown in evidence and all the inferences from those facts make it clear that plaintiff's own negligence produced or contributed, as the proximate cause, to produce the injury for which recovery in damage is sought, then and in every such case the question is for the court alone. *McMurtry v. L. N. O. & T. Ry. Co.*, 67 Miss. 604, 7 South. 401."

Beach, in his work on Contributory Negligence (page 454), under the head "Contributory Negligence as a Matter of Law," elaborates this idea in a most admirable manner: "What amounts to negligence, as we have already seen, is a question of law. It is for the court to say, in a majority of instances, what is, and what is not, negligence as an abstract proposition. When, therefore, the facts of a given case are undisputed, and the inferences, or conclusion to be drawn from the facts, indisputable, when the standard of duty is fixed and defined, so that a failure to attain it is negligence beyond cavil, then contributory negligence is a matter of law."

To prevent a recovery in this case, the plaintiff's negligence must proximately contribute to the injury. If the sole immediate cause of the injury was the defendant's negligence, the plaintiff can recover, notwithstanding previous negligence of his own. *Miss. Central R. R. Co. v. Mason*, 51 Miss. 244.

It was negligence on the part of the appellant in blocking the highway as heretofore described. It is

clear that the appellee, in attempting to go home, found the road thus blocked. It was a very dark night. He was so situated that the very laws of necessity forced him to act in some way. In the nature of things, he must then and there decide to remain in the road for the night, or return to seek shelter at some neighbor's house, or attempt to go forward to his home. He chose the latter course, and did attempt to pass around the obstruction. Was this a reasonable decision for him to make, in the light of all the facts before him? Was it such a course that most any reasonable and prudent man would have adopted under similar circumstances? Was his negligence such as to amount to an utter disregard for his own safety, or did he use ordinary care and prudence? If so, he is not guilty of contributory negligence *per se*.

These were some of the questions necessarily before the jury, and it was for them to say whether appellee was guilty of such contributory negligence as would bar a recovery, and not for the court. It has been well said: "Where the facts are conceded, but the inference in regard to negligence is still doubtful, depending upon the general knowledge and experience of men, it is the judgment and experience of the jury, and not the judge, which is to be appealed to." We are of the opinion that, under the facts as contained in this record, the court was correct in submitting the case to the jury.

The learned counsel for appellant earnestly insists that the obstruction of the highway did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible. If counsel's position is correct, the instruction was improperly given, and defendant railroad company should have had a peremptory instruction. We think, however, from the record in this case, that the injury sustained by plaintiff is directly traceable to the obstruction of the highway by the defendant railroad company. It is manifest that the railroad company blocked the highway, and if this

99 Miss.]

Opinion of the court.

negligence had not been committed by it the appellee would not have attempted to go this circuitous route, and this injury would not have befallen him. We think the blocking of the highway was the proximate cause of the injury.

Counsel for appellant further insists that the instruction is fatally defective, because the jury are told, "if the plaintiff has shown by the evidence," etc. He contends that it should have read, "If the jury believe from the evidence," etc. We think this criticism too technical. The criticism does not go to the substance of the instruction, but rather to its form. Taking the instruction as applied to the facts, we think is substantially correct. But, should we be in error, the jury could not have been misled by it, when considered and construed in the light of instruction No. 3 given for appellant, and all other instructions in the case.

Affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons there indicated by the Commissioner, the case is affirmed.

Brief for appellant.

[99 Miss.]

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *v.* MRS.
MARY JEFFRIES, ADMINISTRATRIX.

[55 South. 354.]

EXECUTORS AND ADMINISTRATORS. *Letters revoked. Right to apply.*
Code 1906, sections 2093 and 2019.

Under Code 1906, section 2093, which provides that "when either of the parties to any personal action shall die before final judgment, the executor or administrator of such deceased party may prosecute or defend such action;," and section 2019, Code 1906, which provides that "an administrator may be appointed to institute and conduct suits, whose power shall cease when the litigation is entirely closed. A railroad, defendant, in a pending suit for personal injury brought by a plaintiff who dies while the suit is pending, has no such interest as will entitle it to move for revocation of letters of administration granted to a party for the purpose of prosecuting such suit.

APPEAL from the chancery court of Desoto county.

HON. J. T. BLOUNT, Chancellor.

Proceeding by the Yazoo & Mississippi Valley Railroad Company to revoke letters of administration of Mrs. Mary Jeffries on the estate of R. W. Jeffries, deceased. From a decree in favor of the administratrix, the railroad appeals.

The facts are sufficiently stated in the opinion of the court.

Mayes & Longstreet, for appellant.

Section 2091 of the Code of 1906, which is a practical rescript of section 1916 of the Code of 1892, provides that executors, administrators and temporary administrators may commence and prosecute any general action whatever, in law and at equity, which the testator, or intestate may have commenced and prosecuted. But this means, of course, where there is an administrator

by appointment under the law in this state, or where the temporary trustee was appointed to preserve an estate of which some right of action was a part.

Section 2019 of the Code provides: "If necessary an administrator may be appointed to institute and conduct suit, whose power shall cease when the litigation is entirely closed, and who shall only account for the proceeds of the suit."

The sections above quoted constitute practically all the statutes bearing on the subject of consideration, and we have referred to them in close sequence, in order that we may understand clearly the proposition we now submit and offer as a reason why Mrs. Jeffries should not have been appointed administratrix to proceed with the suit against the defendant, and why the estate of R. W. Jeffries, after his death, possessed no property, no effects and no rights in action in Mississippi.

We now desire respectfully to assert that when R. W. Jeffries, a citizen and resident of the state of Tennessee, died in that state intestate, that all his rights to recover for any alleged libel or slander uttered against him in his lifetime, died, abated and ended with him and his decease.

Under the law of the state of Tennessee, the place of residence and domicile of Jeffries at the time of his death, it is provided by express statute, that rights of action for libel and slander shall expire and die with the plaintiff in a pending suit founded thereon. The statute of Tennessee in question is section 4569 of Shan-non's Code and is as follows:

"What actions survive.—No civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party but may be revived."

The statute has been completed and applied in the following decisions of that state: 3d Sneed, 128; 4th Heis, 201; 7th Heis, 231; 7th Box, 299; 11 Lea, 10-11.

The court will, therefore, perceive that if Jeffries possessed any right at all, it was a personal right vested in him and which was in him in the state of Tennessee. The suit at law which he had instituted in the circuit court of Desoto county was but the remedy, the channel through which he was attempting to effectuate his alleged right of action.

Of course, there is an essential difference between a remedy and a right, and we need not trespass on the time and attention of the court to discuss this proposition. The right was attached to, existed in and always accompanied the person of the possessor of the right. Therefore, when Jeffries died in the state of Tennessee, while a citizen of, and a resident in that state, the right died with him by the express statutory provisions of the law of the state of his domicile, at the time of his death.

So when any person after his death should apply for the grant letters of administration thereof, alleging in the petition, as appears on the face of the record, the allegation and admission that Jeffries had no property or effects in the state of Mississippi subject to administration, and no right of any sort which could be considered a "property right," except the pending suit for damages for libel, then it appears that no letters of administration should have been granted, because no right in Jeffries or in his estate survived him, or could be represented by an administrator; therefore, the administrator represented nothing at the date of the filing of her application for appointment.

Robert L. Dabney, for appellee.

The brief filed by counsel for the appellant contains the most curious, but ingenious argument that it has ever been the fortune of this writer to see; counsel for appellant appears to admit that if Jeffries had not begun the suit in his lifetime, then, under section 2019 of

the Code, a temporary administrator could have been appointed, provided, as he says, there was anything in Mississippi to be administered upon: That is, his objection is two-fold: first, that section 2019, while it permits the appointment of an administrator for the purpose of instituting suits, it does not authorize the appointment of an administrator to conduct to conclusion a suit begun by the intestate in his lifetime. I dismiss this proposition as being without merit, or being too deep for my comprehension. But says counsel, if mistaken in this, the statutes of Tennessee do not provide for the survivor of libel suits: To this we have two answers; first, this is not a suit for libel; and as that very question is one of the "fighting" questions in the circuit court suit; and second, if Jeffries had a right to commence his suit in the state of Mississippi, in case of his death pending such suit, the laws of Mississippi, and not those of Tennessee, control.

As I have not the record before me, I am not sure how much of the circuit court file is copied into it, but from the declaration, itself, it is very apparent that it is not a suit for libel. This is evidenced by the facts that no matter alleged to be libelous is copied into it, and many of the acts charged a violation of Jeffries' rights are alleged to have been committed much more than a year prior to the filing of the declaration. In fact, the question of whether the statute of limitation controlling in actions for libel apply in this case has been raised, and decided adversely to the defendant in the circuit court, appellant here. Hence, we respectfully submit that if the Tennessee statutes do not provide for the survivor of libel actions, the question of whether the Tennessee or Mississippi statutes are to control in the final determination of this case will not be decided in a collateral issue, when that very question; both whether this is a suit for libel, and whether the Tennessee statutes have application, are vital questions in the case in the circuit

court. It would be a strange construction of our statutes if Jeffries having worked all his life (since boyhood) for the old Mississippi and Tennessee and later for the Yazoo & Mississippi Valley, both Mississippi corporations, and the wrong complained of having been done him while agent at Rosedale, in Bolivar county, Mississippi, and he having begun a suit for that injury in the courts of Mississippi, that these courts should lose jurisdiction by the operation of a Tennessee statute. But it is idle to multiply words, section 2019 of the Code of 1906 does or does not authorize the appointment of an administratrix to prosecute a suit begun in the lifetime of the original plaintiff; the language of the statute is, "to bring and prosecute suits," and on that statute we stand. We cannot conceive, in this day of liberal construction of remedial statutes, how a black-listing corporation can escape a trial in the circuit court in this case just because the plaintiff died pending the determination of the suit.

We respectfully submit that the action of the chancellor in dismissing the petition of the railroad, appellant, to revoke the letters of Mrs. Jeffries as temporary administratrix of her deceased husband, was eminently proper and the decree should be affirmed.

MAYES, C. J., delivered the opinion of the court.

Some time in October, 1908, and in the lifetime of R. W. Jeffries, he instituted a suit against the Yazoo & Mississippi Valley Railroad Company in Desoto county, seeking to recover damages for certain injuries alleged to have been wrongfully sustained by him. For the purpose of deciding this case, we consider nothing except the fact that the petition for letters of administration discloses that such a suit is pending. Subsequently he moved to Memphis, and died while the suit was pending and untried, and after his death his wife, Mrs. Mary Jeffries, filed a petition in Desoto county praying for the

grant to her of letters of administration. In the petition she states that R. W. Jeffries left no real or personal property, except the suit for damages against the appellant. The petition contains every requisite for a petition of this character, and there is no objection to it for want of form. Letters of administration were granted, and bond executed. After this was done the Yazoo & Mississippi Valley Railroad Company, against whom the suit is pending, moved the court to revoke the letters for causes set out in the motion. We do not give the grounds of this motion, because it is our judgment that the railroad company has no interest that would warrant any such motion on its part. If there is any merit in the grounds of the motion, it must be used as a defense to the pending suit, when the railroad has some interest involved. The railroad has no interest in the question of whether or not letters of administration are properly granted to Mrs. Jeffries, merely because it may give her a right to continue a suit against it.

Section 2093 of the Code of 1906 provides that "when either of the parties to any personal action shall die without final judgment, the executor or administrator of such deceased party may prosecute or defend such action," etc., and section 2019 of the Code of 1906, provides that "an administrator may be appointed to institute and conduct suits, whose power shall cease when the litigation is entirely closed," etc. Under these two sections of the Code express authority is given for the appointment of an administrator to institute or conduct suits, and it is expressly declared that the death of a party to any personal action shall not abate the suit.

Counsel for appellant raise many interesting questions, but none of them can be considered in this proceeding.

Affirmed.

SOUTHERN RAILROAD COMPANY v. MRS. EMMA GANONG.

[55 South. 355.]

1. INSTRUCTIONS. *Reference to pleadings. Error cured.*

An instruction that the jury will find a verdict for plaintiff if the evidence showed she was injured in the manner set out in the declaration, is error as tending to confuse and mislead the jury.

2. SAME.

But where other instructions set out the facts necessary for the jury to believe in order to render a verdict and the declaration itself sets out such facts as that the jury could not be misled, such an instruction is harmless.

APPEAL from the circuit court of Alcorn county.

HON. JNO. H. MITCHELL, Judge.

Suit by Mrs. Emma Ganong against the Southern Railway Company. From a judgment for plaintiff defendant appeals.

The facts are stated in the opinion of the court.

W. J. Lamb, for appellant.

Charge No. 2, given for the appellee, says that if the appellee was injured as a direct result of "such failure and plaintiff was injured in whole or in part substantially as set out and alleged by her in her said declaration, then the jury will find for the plaintiff."

We are at a loss to know what this charge means when it says, "was injured in whole or in part." If the appellant did not cause all of the injury, but only part of it, for what part ought the appellant to have to pay damages. The charge which is given gives the jury no criterion by which to assess damages for the appellant although they may believe that the appellant did not cause all of the injury to the plaintiff. This charge again says that if the plaintiff proves substantially what

she set out in her declaration, then the jury will find for the plaintiff. We respectfully submit to the court that the plaintiff did not prove substantially, or in any other way, what is set out in her declaration for she contends in her declaration that her kneecap was broken and crushed, and broken loose from its normal position, when as a matter of fact the proof shows that there was no injury perceptible except a little dark spot on the knee. It is an elementary principle of law that a person cannot claim damages for one injury and recover for another, and that is exactly what is undertaken to be done in this case, and what is done up to the present time, and we respectfully submit to the court that because of this being such a close case on the facts that these two charges misled the jury, and this verdict should not stand.

The fifth charge is subject to the same criticism as the second for it says that if she received the injury, or any part thereof, as set out in her declaration, without any proof to sustain the allegations in her declaration, and no attempt is made on the part of the appellee to amend her declaration so as to conform to the proof.

The sixth charge is subject to the same criticism.

When the charges given for the appellee in this case are analyzed and applied to the facts in this case, we respectfully submit that they are error and that the jury was misled, for the appellee has gotten judgment for one injury when she sued for another. This being our contention in the case, we respectfully submit that the court erred in overruling the motion of the appellant for a new trial because the verdict was contrary to the law and the evidence in the case, and this court should correct this error by reversing this case.

Young & Young, for appellee.

We humbly submit that by a careful inspection of the record in this case, which is short, it will readily

be seen by this court that none of appellant's assignments of error have any merit in them, that no injustice has been done appellant, either by the court in its instructions to the jury, as to the law arising on the facts and governing in the case, or by the jury in its finding on the facts, and that the insinuations of appellant's counsel, in his brief, to the effect that appellee, in instituting and maintaining her suit, was not and is not acting in the utmost good faith, is utterly without the shadow of warrant.

Appellee by her testimony shows, that the injury complained of and which caused her such great pain and suffering, lasting several months, despite the care and treatment of several physicians, resulting finally in the loss of the use of her knee-joint and the loss of her power of locomotion, without the aid of crutches, was the direct result of the negligence of the servants of appellant in suddenly starting its train on which appellee was a passenger, with a lurch and jerk, before she had been allowed a reasonable time or been previously notified or warned, in which to select her seat and seat herself thereon, and while she was in the act of seating herself. Said sudden starting and lurching and jerking being of such great violence that it threw her down on the seat, selected by her, striking her knee against the frame work thereof causing the injury aforesaid.

Appellant failed to put any of its said servants on the witness stand to contradict appellee's testimony above in any particular, but its counsel, however, has gone outside of the record to state that appellant did not know appellee claimed to have been hurt until she brought her suit and that too in the face of the fact that appellee in her testimony, distinctly states that when she disembarked from said train at Iuka, she informed the conductor, who assisted her therefrom, of the fact that she had been badly injured while on said train, as an apology

for her inability to alight therefrom and in consequence thereof he told her to take her time and because thereof assisted her therefrom to the ground. Counsel for appellant further goes out of the record to state that, "it was impossible for appellant's servants to remember how said train was being operated on the day appellee claims to have been injured." The proper thing for him to have done, however, was to have put said servants on the stand, as witnesses, and have let them testify, before the court and jury, as to whether they did or did not remember how appellant's train was operated at the time and place of the infliction of the injuries complained of and not having done so the statement of counsel will, of course, not be taken as an excuse therefor, and the presumption of law will prevail, that they were not put on the stand, as witnesses, because they could not contradict the testimony of appellee and that the latter was true.

It will be noted that the train was not, at the time of its being suddenly started with a lurch and jerk, leaving on its journey but was only moved forward a few feet where it again stopped and after remaining standing there several minutes, was then started on its journey; according to the testimony of appellee which is in no way contradicted.

ANDERSON, J., delivered the opinion of the court.

The appellee, Mrs. Emma Ganong, sued the appellant, the Southern Railway Company, for personal injuries, and recovered a judgment, from which appellant prosecutes this appeal.

The giving of instructions Nos. 1, 2, and 3 for appellee is assigned as error. By these instructions the jury was directed, in substance, to return a verdict in favor of appellee, if the evidence showed she was injured in the manner set out in the declaration. This was error. The jury was entitled to have the law of the case, as given by the court, written out in full in the instructions. To

require the jury to resort to the pleadings in the case, to patch up and piece out the instructions, is calculated to confuse and mislead them. In many cases the pleadings set out the cause of action and the defense thereto with such prolixity that it would be exceedingly difficult for the jury, by reference to them, to extract therefrom the allegations sought to be incorporated in the instructions; in fact, cases arise where one learned in the law would have much difficulty in so doing. It is manifest that in such cases instructions so drawn would be most prejudicial to the rights of the opposite party.

However, in the case in hand, we find that the error in these instructions was without prejudice to the appellant, for two reasons: First, in other portions of these instructions the facts necessary for the jury to believe, in order to render a verdict for the appellee, are sufficiently set-out; second, it happens in this particular case that the facts on which the cause of action is grounded are so set out in the declaration that the jury could readily refer to it and ascertain what the court meant by the instructions.

We find no merit in the other assignments of error. We make these observations in reference to instructions given in this form, in view of the fact that such practice is becoming quite common.

Affirmed.

MILLIE WEBB v. STATE.

[55 South. 356.]

1. CRIMINAL LAW. *Robbery. Putting in fear. Code 1906, section 1361.*

Under Code 1906, section 1361, providing that "every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery," in an indictment for robbery, it is necessary to aver in the indictment and prove that the alleged robbery was accomplished either by violence to the person charged to have been robbed, or by putting such person in fear of some immediate danger to his person.

2. SAME.

In such case an indictment is fatally defective, if it fail to charge that the danger was immediate.

APPEAL from the circuit court of Lauderdale county.

HON. JOHN L. BUCKLEY, Judge.

Miller Webb was convicted of robbery and appeals. The facts are fully stated in the opinion of the court.

F. V. Braham, for appellant.

Jas. R. McDowell, assistant attorney-general, for appellee.

ANDERSON, J., delivered the opinion of the court.

The appellant, Miller Webb, was convicted of robbery, sentenced to seven years in the penitentiary, and appeals to this court.

The court below overruled appellant's demurrer to the indictment, and this action is assigned as error. Appellant was indicted under section 1361, Code of 1906, which is as follows: "Every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by vio-

lence to his person or by putting such person in fear of some immediate injury to his person shall be guilty of robbery." The charging part of the indictment is in this language: "Did unlawfully and feloniously make an assault in and upon one Carey Flowers, and him, the said Carey Flowers, did then and there feloniously put in bodily fear and danger of his life, and fifteen one dollar United States treasury notes, of the value of fifteen dollars in lawful money of the United States, whose further description is to the grand jury unknown, and certain silver coin, lawful money of the United States and of the value of fifty cents, whose further description is to the grand jury unknown, all the property of the said Carey Flowers, from the person and against the will of the said Carey Flowers, did violently and feloniously take, steal and carry away. . . ."

Under this statute it is necessary to aver in the indictment, and prove, that the alleged robbery was accomplished either by violence to the person charged to have been robbed, or "by putting such person in fear of some immediate danger to his person." The indictment in this case attempts to charge robbery by putting in fear the person alleged to have been robbed "of some immediate danger to his person;" but is fatally defective because of the absence of the averment that the danger was immediate. It is no violation of this statute to forcibly take the personal property of another by putting such other in fear of danger to his person, to be done him at some future day. For example, if one person says to another, "Unless you now deliver to me the money you have on your person, I will kill you the next time I see you," and the person so approached, through fear of such threats being carried out, accordingly delivers to the person so approaching him the money which he has on his person, this statute is not violated. *Smith v. State*, 82 Miss. 793, 35 South. 178.

Reversed and remanded.

R. J. McLIN & COMPANY v. J. T. WORDEN.

[55 South. 358.]

1. FOREIGN JUDGMENT. *Certification. Evidence. Attachment. Code 1906, section 171. Construction of statute.*

A judgment recovered in another state cannot be proved or admitted in the courts of this state as evidence of the fact, until there has been a compliance with section 905 of the Revised Statutes of the United States.

2. SECTION 171, CODE 1906. *Attachment.*

Under section 171, Code 1906, a defendant is entitled to have his damages assessed for the wrongful suing out of a writ of attachment, if the question of indebtedness be decided in his favor, although the grounds upon which the attachment was sued out were not contested by him and is not compelled to bring a new and independent suit on the bond.

3. SUPREME COURT. *Construction of statutes.*

Where a statute has been reenacted after being construed by the supreme court, such construction will be adhered to by that court.

APPEAL from the circuit court of Panola county.

HON. W. A. ROANE, Judge.

Suit by R. J. McLin & Company against J. T. Worden.

From a judgment for defendant, plaintiff appeals.

The facts are as follows:

This suit was based upon a foreign judgment obtained by appellants against appellee in Wolfe county, Ky. The suit was begun by attachment in the justice court upon a certified copy of said judgment. Alias writs of attachment and garnishment were issued and process served upon the defendant. On the return day defendant filed a plea in abatement. The Bank of Sardis, summoned as garnishee, answered, admitting its indebtedness to the defendant. On the trial the attachment was sustained, and the defendant (appellee here) failing to

make any defense to the debt, judgment was rendered against him for the amount of the debt. On the trial in the circuit court the defendant gave notice of the withdrawal of his plea in abatement, and the court awarded a judgment in favor of the appellants, sustaining the attachment and the trial proceeded upon the debt issue. The plaintiffs then offered in evidence the certified copy of the judgment obtained in Wolfe county, Ky. Defendant objected, and the objection was sustained, and judgment entered against the plaintiffs (appellants here). The defendant then made a motion for a writ of inquiry to assess damages, which motion was sustained and the writ awarded. Appellants assign as error the action of the lower court (1) in refusing to admit the certified copy of the judgment in evidence and (2) in awarding the writ of inquiry.

W. E. Boothe, for appellant.

The main grounds relied upon by appellant for a reversal of this cause, is the error of the court below in:

1st. Refusing to admit as evidence upon the part of appellant, the certified copy of the judgment of the Wolfe circuit court, and

2d. Awarding a writ of inquiry to assess damages, although appellant's attachment had been sustained.

3d. The court erred in refusing to admit as evidence for appellant, the certified copy of the judgment of the Wolfe circuit court of Wolfe county, state of Kentucky.

Prior to the adoption of the Code of 1880, section 1622, we find no legislative provision by the laws of sister states to be recorded, and such instruments, prior to the adoption of section 1622, Code 1880, were to be proven by the acts of congress. Revised Statutes of the United States, section 905.

As said by the court in the opinion rendered in the case of *Hope v. Hunt*, 59 Miss. 174, and relied upon by counsel for appellee in the case at bar, "the mode of

authentication presented by congress is not exclusive of any other which he states may see proper to adopt, and such statement seems to be borne out by the decision of these states which have prescribed other methods of authentication." The court, in rendering the opinion in the case of *Hope v. Hunt*, 59 Miss. 174, seems to have assumed that section 1622, Code 1880, referred to "private writings," and upon this assumption based their conclusion. In no other view of the case am I able to conceive how they could have arrived at the conclusion they did. Just here I desire to call attention to the language of this section, which is in the following words: "Copies of the record of any writing, required or permitted by the laws of this state or any other state or territory of the United States, or by the District of Columbia, shall, when certified by the clerk in whose office the record is kept under his seal of office, be received as evidence in all the courts in this state." And section 1629, Code 1880, makes the certificate *prima facie* of the official character of such person, in all courts and proceedings in the state.

Sections 1622 and 1629, Code 1880, are identical with sections 1955 and 1973, Code 1906. Nowhere in the said sections are the words "private writings" used, but I do find the language "any writing." "Any writing" includes both private and judicial papers, decrees or orders, and it was evidently the intention of our lawmakers in adopting into Code 1880, sections 1622 and 1629 to provide for a method of authentication of the writings of sister states, so that the same may be used as evidence in our courts without going to the trouble and expense of obtaining the certificate of the judge of the court, as provided by the act of congress. The judgment sought to be introduced in evidence in the case at bar was a judgment rendered by the Wolfe circuit court of Wolfe county, state of Kentucky. The question which next presents itself is, does the state of Kentucky "re-

quire or permit" judgments or writings of this character to be recorded, and if so, is not such a judgment within the meaning and intention of our statute?

If this court should hold that section 1955, Code 1906, refers to any and all writings, "required or permitted" to be recorded by the laws of our sister states, and not to "private" writings alone, then the evidence offered was improperly excluded.

For the reasons above set forth, it is the contention of appellant that refusing to admit evidence the certified copy of the judgment of the Wolfe circuit court, as offered by appellant, is such error as to entitle appellant to a reversal of this cause in this court.

But if I am mistaken in this, and this court should hold that this evidence was properly excluded, appellant is still entitled to a reversal of the judgment of the court below, because,

2d. The court in awarding a writ of inquiry to assess damages, after appellant had sustained the attachment.

This court has held in more than one instance, that the awarding of a writ of inquiry to assess damages, under our attachment statutes is purely a statutory provision, and is only allowed, where the issue on a plea in abatement to the attachment is found for defendant (Code 1880, sec. 2429); or where plaintiff voluntarily dismisses its attachment. Code 1880, sec. 2432; *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111; *Bonds v. L. Garvey & Co.*, 39 So. 492.

In the case of *Betancourt v. Maduel*, 69 Miss. 839, the court held that, "when a judgment by default on the attachment issue is rendered for plaintiff, but the issue made by plea denying the debt, is found for defendant, thus dissolving the attachment, the defendant is not entitled to a writ of inquiry to assess his damages for the wrongful suing out of the attachment."

The above cited case is exactly on all-fours with the case at bar. Appellee withdrew his plea in abatement,

and thereupon a judgment by default was rendered against appellee, sustaining the attachment, but the issue made by the plea denying the debt was found for appellee, upon the refusal of the court to admit the evidence of the debt, the certified copy of the judgment of the Wolfe circuit court.

Sections 2429 and 2432, Code 1880, under which sections the case of *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111, was decided, are brought forward and are identical with sections 170 and 173, Code 1906, and these two sections are the only statutes we have providing for writs of inquiry to assess damages for defendants in attachment cases. Where no plea is interposed to the attachment, the court must enter a judgment by default, sustaining the attachment, as was done in the case at bar. Code 1906, section 168. Plaintiff must either dismiss his attachment, or the issue raised by a plea in abatement must be found for the defendant to entitle him to this remedy, otherwise the writ is improperly awarded. This is the statutory law, and this is the rule announced by the decisions of this court. This same rule is laid down in the later case of *Bonds v. L. Garvey & Co.*, 9 So. 492. Chief Justice Whitfield in delivering the opinion of the court in this case says, "The whole matter of damages in attachment proceedings is purely statutory, and in the absence of a statute providing therefor we do not think the court was correct in allowing damages." The remedy is "purely statutory" and the case must come within the two statutory provisions, sections 170 or 173, Code 1906, to entitle a defendant to damages, otherwise damages will be improperly awarded. There is no statute providing for the award of damages to a defendant in the court below, where the plaintiff in that court sustains his attachment. On the contrary the statute provides that unless the issue raised by a plea in abatement to the attachment is found for defendant,

he is not entitled to have a writ of inquiry to assess his damages. Section 170, Code 1906.

Nor is the law, as laid down in the *Betancourt v. Maduel* case, above cited, overruled by the decision of the court in the case of *Cassius M. Carrier & Son v. Thomas Poulas et al.*, 87 Miss. 595. The Carrier-Poulas case is not a case in point with the case at bar, as will appear by a careful study of that case. In fact the opinion of the court as announced by Justice Calhoun shows that he recognizes the rule of law laid down in the former decisions of the court on this point, for in the very first sentence we find his language, "On an issue whether the attachment was properly sued out, Code 166, provides that, when the verdict is for the defendant, he may recover damages. In the case before us, the affidavit being on the ground of non-residence, which could not be denied in this instance, the court allowed a writ of inquiry and awarded damages on the attachment bond, the jury having found on the main issue that there was no debt." No defense whatever, was made to the attachment in this case, but a special plea was filed by the defendant denying the debt upon which the attachment was sued out and upon this issue the defendants recovered a judgment. As stated in the opinion of the court, the grounds of attachment was that the defendants were non-residents, and this could not be denied in this instance. The plaintiffs in attachment, Carrier & Son, took no judgment sustaining the attachment, but simply joined issue on the special plea filed by these defendants, Poulas and others. And as stated in the opinion delivered by Justice Calhoun, the main issue tried was the issue of debt raised by defendants' special plea.

The main issue raised in the case at bar was, whether or not the attachment was properly sued out. *Cocke v. Kuykendall*, 41 Miss. 65.

For some reason unknown to appellant, appellee saw fit upon the trial of the case at bar in the circuit court,

to withdraw his plea in abatement, and appellant thereupon took a judgment against him sustaining the attachment. Sec. 168, Code 1906. This judgment for appellant dissolves the attachment, so there can be no further liability under the attachment bond, as the attachment issue has been fully disposed of by this judgment. *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111. The debt issue, the next issue to be tried in the circuit in the case at bar, was disposed of after the attachment had been dissolved.

Again section 166, Code 1892, referred to in the case of *Carrier v. Poulas*, 87 Miss. 595, and brought forward in section 171, Code 1906, refers to the trial of the issue raised by a plea in abatement, as will be noted by reading the preceding section 165, Code 1892 and section 170, Code 1906. It will be seen by a comparison of the two cases, the case at bar and the *Carrier-Poulas* case that the two issues tried and questions raised in the court below, are entirely different. In the one case, the main issue which was presented was, whether or not the attachment was rightfully sued out, in the other case the main issue tried was one raised by the defendant's special plea denying the debt. This question of issue is recognized by Justice Calhoun in his opinion, and he states and uses the term, "main" issue. Another difference to be noticed in the two cases above referred to, is the fact that in the *Carrier-Poulas* case, plaintiff in the case below did not take a judgment by default sustaining his attachment, which they had the right to do, as no plea traversing the grounds of the attachment was interposed.

This case at bar clearly comes within the statutory provisions, relating to attachment cases, and is exactly on all-fours with the case of *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111, which is the law today, as no decision has been rendered by this court overruling the doctrine as laid down in that case.

In view of the errors of the court below above assigned, we respectfully submit that this cause should be reversed, and remanded.

Shands & Montgomery, for appellee.

This suit was based upon a foreign judgment. Upon the trial the only evidence of such judgment offered was a certified copy. It is of course hornbook law, that there must have been an authenticated copy, in accordance with the acts of congress. We do not care further to be heard on this proposition. Of course the court had to exclude the evidence which of necessity resulted in a peremptory instruction for the defendant on the debt issue.

As to the second point in appellant's brief, we must say that we formerly held to the same opinion, that is now presented in the brief of appellant. We did not think that it was proper for the court to order the issuance of the writ of inquiry to assess damages upon the failure of plaintiff in an attachment suit on the debt issue, and strongly urged this view upon the court in our brief in the case of *C. M. Carrier & Co. v. Thos. Poulas et al.*, reported in 87 Miss. 595. The court according to the best of our recollection did not take kindly to that idea at that time, and there has since the decision of that case been no other act of the legislature nor decision in conflict therewith. The court in deciding the Carrier case said that writ of inquiry should issue, and that it was a waste of time to put the bond in suit. We submit, that as this rule was established on us, we should not be made the subjects of the change of the court in this point.

We had that case very clearly in mind when we asked for the writ of inquiry in the case at bar.

We respectfully submit that even if the court should see fit to overrule the *Carrier case*, *supra*, that they should affirm the decision of the lower court on the mer-

its, and reverse the case only so far as the awarding of damages is concerned.

Wee see no reason for the court to change this rule of practice established in the *Carrier* case, and respectfully submit that the case should be affirmed.

MAYES, C. J., delivered the opinion of the court.

If it be true that a judgment was recovered in the circuit court of Wolfe county, Kentucky, against appellee, it could not be proved or admitted in the courts of this state as evidence of the fact, until there had been a compliance with section 905 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 677). This section of the United States Revised Statutes is found in the appendix to the Code of 1906, at page 1385. The judgment claimed to have been recovered in Kentucky, and offered in evidence to prove the debt, did not comply with the United States statute above cited. The judgment had the attestation of the clerk, but did not have the certificate of the judge, as is required by the United States statutes.

All other questions involved are settled by the case of *Carrier v. Poulas*, 87 Miss. 595, 40 South. 164. In the case just named it was held that under section 171, Code of 1906, a defendant was entitled to have his damage assessed for the wrongful suing out of a writ of attachment, if the question of indebtedness be decided in his favor, although the grounds upon which the attachment was sued out were not contested by him; in short, a defendant is not compelled to bring a new and independent suit on the bond. The above case does not refer to the case of *Betancourt v. Maduel*, 69 Miss. 839, 11 South. 111, though it seems to be in conflict with it.

The *Carrier* case, *supra*, is the later holding of this court, and since the same section of the Code has been re-enacted with the later construction of the court placed

upon the statute, and without any change being made by the legislature, we feel that it is our duty to adhere to the case of *Carrier v. Poulas*. *Affirmed.*

M. E. HALEY v. DRAINAGE COMMISSIONERS OF LEFLORE COUNTY.

[55 South. 353.]

1. DRAINAGE DISTRICT. *Petition to establish. Sufficiency. Bonds. Interest. Code 1906, sections 1684, 1703, 1706, 1709. Acts 1906, chapter 132. Constitution 1890, section 90.*

Under Code 1906, section 1684, and Acts 1906, chapter 132, section 3, requiring that a petition to create a drainage district, "should set forth or show the names of the owner of the several tracts of land mentioned therein to be embraced in the district." A petition which in one paragraph describes the land to be embraced within the district and in the next paragraph recites that the land embraced in the proposed district belonged to the following named persons with the postoffice address of each following his name and then recites a list of all landowners with their postoffice address, without stating what particular land was owned by each, was a sufficient compliance with the statute.

2. BONDS. *Interest. Code 1906, sections 1703, 1706, 1709. Acts 1906.*

Sections 1703 and 1706 of Code 1906 and the corresponding sections of acts 1906 authorize the payment of interest on drainage bonds, and section 1709 of Code 1906 and the corresponding sections of acts 1906 provides both for the payment of this interest annually and for the collection of the money necessary so to do by assessment made by the board of supervisors.

3. CODE 1906. *What included.*

The Code of 1906 consists of the matter included in the enrolled bill containing same filed in the office of the secretary of state and this enrolled bill includes chapter 39, and the fact that this chapter was omitted from section 1, chapter 1, of Code, which section designated what chapters should constitute the Code, makes no difference.

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Brief for appellee.

4. *Constitution 1890, section 90. Acts 1906, chapter 132. Code 1906, sections 1682 and 1727. Local laws.*

Constitution 1890, section 90, prohibiting local laws in regard to watercourses, has no reference to artificial watercourses and does not invalidate acts 1906, chapter 132, nor Code 1906, sections 1682 and 1772, because counties are exempted from the provisions of the act, as it is immaterial whether these statutes are local or general.

APPEAL from the chancery court of Leflore county.

HON. M. E. DENTON, Chancellor.

Suit by M. E. Haley against the Drainage Commissioners of Leflore county. Decree dismissing the bill and plaintiff appeals.

The facts are stated in the opinion of the court.

Gwin & Mounger, for appellee.

Conceding, for the time being, the validity of the law under which the order of the commissioners and the decree of the chancellor levying said assessment and providing for the issuance of said bonds were made, we submit that the chancellor and the said commissioners were without jurisdiction and without authority to pass said order and decree, for the reason that the original petition filed in said matter praying for the organization of said drainage district does not set forth or show the names of the owners of the several tracts of land mentioned therein, to be embraced in said district. Said petition set forth that "the proposed drainage district embraces the following lands in Leflore county, Mississippi, to wit: Sections 19, 20, 21, 22, 27, 28, 29, 30, 31, 32, 33, 34, in T. 19, R. 2 W., also sections 3, 4, 5, 6, 7, 8, 9, 10, and 15 in T. 18, R. 2 W." In the next paragraph said petition recites that "the land embraced in the proposed drainage district are owned by the following named persons, with the postoffice address of each following his name," and thereupon follows the list of all landowners with their postoffice addresses, but said petition does not

show which landowners owns any particular tract or part of said land.

The statute providing for the filing of said petition (Sec. 1684, Code 1906, sec. 3, chap. 132, acts of 1906), provides that said petition shall set forth the proposed name of said drainage district, the necessity for the same," with the description of the lands to be included in said drainage district, of the name of the owners, when known, together with the postoffice address of such owner, if the same can be ascertained."

We submit that this statute contemplates and requires that the owner of each several tracts of land shall be given in said petition as the owner of such tracts, and that this petition does not meet with this requirement, and as this is a proceeding *in invitum* the requirements of the statute must be fully met.

It is contended that section 1711 of the Code of 1906, section 30, chapter 132, of the Laws of 1906, obviates this imperfection in the organization of the district, and that the judgment of the chancellor providing for said assessment is conclusive that all prior proceedings were regular and according to law, but we submit that this statute could not have this effect if the court was without jurisdiction in the matter. It will be borne in mind that this is a proceeding by which it is sought to force supposed benefits upon the landowners, benefits unsought by many of them, and to force them to pay for the same, against their will, by confiscating and selling their land in case of their failure or inability to pay. Every step provided by the statute must be complied with, every requirement of the statute must be fully met in such a proceeding. "Whenever a new or special power is given by legislation, it must appear upon the face of proceedings thereunder that the statute granting the power has been strictly pursued, otherwise the proceeding will be void." *Brown v. Owen*, 75 Miss. 324. And if the legislature had the power to enact such a statute at all, it

certainly did not have the power to make any decree or judgment or order in such a proceeding conclusive of facts contrary to the facts shown by the record in the proceeding; and this petition is an essential part of the record and that part of the record which gave jurisdiction to the court, if it had jurisdiction.

The decree of the chancellor and the order of the commissioners making said assessment, both of which were made on the 2d day of September, 1910, provide that the said assessment and the several installments thereof shall bear interest at the rate of six per cent per annum from date until paid paid.

The statute providing for said assessment (Section 1703, Code of 1906, section 22, chapter 132, acts 1906) provides that "the assessment and the installments thereof shall draw interest at the rate of six per cent per annum from the time of the confirmation until paid."

A deed of trust which secures the payment of a promissory note which bears interest from date until paid, could not be foreclosed until the maturity of the note, although it provides for its foreclosure upon default in payment of interest. There could be no default in the payment of said interest until the maturity of such note, because the interest would not be due until the date of the maturity of the note.

Yet, the said order and decree provide for the issuance of bonds bearing interest payable annually, although there is no provision in the statutes, nor in said order or decree, for any tax levy or assessment for the payment of said interest annually.

It is contended that section 1709, Code 1906, or section 28 of chapter 132, acts of 1906, provides for the levy of an annual tax by the board of supervisors. These sections simply provide for the report by the county treasurer of the bonds outstanding.

No where is the power conferred upon the board of supervisors to levy any tax and the power to levy such

a tax cannot be implied. If it is implied, when is it due and payable, and how much does it amount to? It cannot be said that the amount is the amount of the interest due annually, because the cost of collecting the tax would not be provided for, nor would the treasurer's commissions be included, and if these costs of collection and handling are deducted the amount would be insufficient to pay the interest. It is contended that the legislature intended to confer this power upon the board of supervisors by these sections of the drainage acts. We are unable to say what the legislature intended to do in this regard, but we confidently contend that the legislature did not confer this power upon the board of supervisors and that said board is without authority so to do. We submit that if the legislature intended to confer this power, it is a case of failure to carry out its intention similar to the parts of the Code chapter upon municipalities relative to one municipality extending its boundaries so as to include the territory of another municipality, which were passed upon in the case of *Village of Gandisi v. Town of Seminary*, 75 Miss. 315. This being true, bonds bearing interest payable annually are not in conformity to the provisions of the statute nor are they issued in pursuance of the power conferred on the drainage commissioners by the statute, and we submit that the said commissioners can issue bonds only as provided by the statute and that any bonds issued by them which are not in strict conformity to the statute are invalid as to both the principal and interest.

We submit that the drainage law, as printed in the Code and as embodied in chapter 132 of the acts of 1906, is invalid and not a part of the public statutes of the state of Mississippi, and that there is no provision of law for the issuance of said bonds or for the creation of said district as attempted in this matter.

The court is presumed to know what the public statutes are, and it requires no evidence to show the court

what is embraced in said statutes. It will look to the enrolled bills and duplicate of the Code in the secretary of state's office in order to inform itself in case of doubt. *Nugent v. Jackson*, 72 Miss. 140; *Hunt v. Wright*, 70 Miss. 298; *Telegraph Co. v. Shannon*, 91 Miss. 476; *Telegraph Co. v. Morgan*, 92 Miss. 108.

The memoranda signed by the Code Commissioners printed on the second page of the Code of 1906, immediately following the preface, and the foot note inserted by the commissioners immediately following section 1 of said Code, show that chapter 39 entitled "Drainage District" is not enumerated in section 1 of said Code nor is it named or mentioned therein.

The act adopting said Code describes the Code so adopted as "The Mississippi Code of 1906 of the public statute laws of the state of Mississippi, compiled by authority of the legislature by A. H. Whitfield, T. C. Catchings and W. H. Hardy, Commissioners, and reported to the legislature by them, and revised, amended and adopted by the two houses of the legislature, an enrolled draft (of) which has been prepared by the joint revision committee of the two houses appointed for that purpose."

The court knows that said chapter 39 entitled "Drainage District," as printed in the Code, was not compiled by said commissioners and reported to the legislature by them. Therefore, said chapter 39 is not described and pointed out as a part of said Code in said act of adoption. We must, therefore, look to section 1 of chapter 1 of the Code to determine of what the Code consists and we find that said chapter 39 is not designated as a part of the Code in said section 1.

It is contended that said chapter 39, although not named or enumerated in section 1 of said Code, is contained in the duplicate of said Code in the secretary of state's office and that, therefore, the same is a part of said Code. We submit, however, that if this is true, the

court has no right to presume that the legislature made a mistake and that the legislature had the right, in adopting said Code, to omit from said Code any part of said duplicate that it saw fit. We submit that section 1 of chapter 1 of said Code shows definitely and certainly what the legislature intended to be the Code of Mississippi and that unless the legislature is presumed by the court to have made a mistake chapter 39 is not a part of the Code of Mississippi.

It is contended that, in so much as chapter 132 of the laws of 1906 was an act of the legislature, adopted at the 1906 session of the legislature, it is still in force, although it might not have been embodied in the Code. The contention is that the last clause of section 13 of the act adopting said Code provides that general laws adopted at the said session of said legislature should not be repealed. We submit that said chapter 132 of the acts of 1906 was repealed on the 1st day of October, 1906, by section 3 of the said Code. Said section 13 of the said act adopting said Code provides that all laws of a general character not brought forward and embodied in the Code shall be repealed, but that this shall not apply to any act of the legislature adopted at the 1906 session thereof, but we submit that this does not affect the question of the repeal of the said statute. We do not claim that said statute was repealed because it was brought forward and embodied in said Code, but our contention is that it was revised and acted upon in secs. 371 to 391 of the said Code of 1906.

In said sections 371 to 391 provision is made for the channelling of streams and watercourses, for the drainage of lands and the protection of the same from wash and overflow, for the appointment of commissioners to do said work, for the levying of taxes to pay for the same and for the issuance of bonds for such purpose. The subject-matter is to be determined with reference to the substantive thing done by the act and not by the

mode of exercising the power conferred (*City of Vicksburg v. Ins. Co.*, 72 Miss. 67), and we submit that the subject-matter is the same in these sections 371 to 391 of the Code and chapter 132 of the Laws of 1906.

It is contended that sections 371 to 391 provide only for the channelling of streams or natural watercourses and that chapter 132 of the Laws of 1906 provides only for drainage through and by means of artificial drains. But we submit that this is not correct. Section 3 of said chapter 132 states the purpose of the district to be organized to be "to establish in said district a combined system of drainage or protection from wash and overflow." Section 12 of said chapter 132 provides that the commissioners shall exclude any part of the lands described in the petition "which do not drain into said watershed," and section 31 provides that the district when organized shall have the power of "surveying—repairing and altering, enlarging, cleaning, and maintaining any drain." "Protection from wash and overflow" from what, but from the natural watercourses? How can "a combined system of drainage or protection from wash and overflow" be established in a district except by dealing with and channelling and controlling the natural streams or watercourses in such district? What "watershed" is meant if not the natural watershed of the district? What drains are to be surveyed, altered, enlarged, cleaned and maintained if not the natural watercourses?

In 14 Cyc. 1052, c., it is said, "Most statutes contemplate that natural streams may be straightened, widened and deepened," and we submit that this statute so contemplates, and that, as is said in *Belzoni Drainage Commission v. Winn*, 53 So. Rep. 778, "the act is incomplete and no feature of it can be enforced successfully, unless the drainage commission has the right to deal with and improve the natural drains in the district. . . . In other words, the power to deal with natural drains is

the warp and woof of the whole act, upon which all else depends." We, therefore, submit that the subject-matter in said chapter 132 and said sections 371 to 391 of the Code is the same, and that said chapter 132 having been approved on April 12th, 1906, was repealed by section 3 of the Code of 1906.

Section 1727 of the Code and section 46 of the said chapter 132 provide that the said drainage laws shall not apply to the counties of Sharkey, Issaquena, Lauderdale, Amite, Wilkerson, Warren, Chickasaw, Tippah and Union.

Inasmuch as the statute does not affect the entire state, but affects only a part of the state, we submit that both said chapter 132 of the Laws of 1906 and said chapter 39 of the Code of 1906 are local or special laws.

Most of the states have constitutional provisions regulating and prohibiting the enactment of local, or private or special laws relating to certain subjects, or providing that all laws of a general nature shall have a uniform operation throughout the state, and in interpreting the constitutional provisions the courts of the several states have repeatedly defined general laws and local and special laws.

In *Sherlock v. Alling*, 44 Ind. 184, the court said: "All general laws extend over all territory over which the state has exclusive or concurrent jurisdiction."

In *Wanser v. Hoos*, 60 N. J. Law 482, 38 A. 4449, 64 Am. St. Rep. 600, the New Jersey appellate court said, "When a law in terms is to operate only in specific localities of the state satisfactory reasons must be found to exclude it from the constitutional prohibition against local laws," and in *Van Cleve v. Parsaic Valley Sewerage Comm's.*, 71 N. J. Law 574, 108 Am. St. Rep. 754, the same court said, "A law is special in a constitutional sense when by force of an inherent limitation it arbitrarily separates some persons, places or things from

those upon which but for such separation it would operate.”

In *Rambo v. Larrabee*, 67 Kan. 634, 73 p. 915, it is held that a law of a general nature which does not have a uniform operation throughout the state is unconstitutional.

In *State v. Sexton*, 11 S. D. 105, 75 N. W. 895, it is held that a statute which provides a special proceeding applicable to only a part of the counties is unconstitutional.

In *Bray v. Board of Choses Freeholders*, 50 N. J. Law 82, 11 A. 135, it was held that a law providing for a public road in each county is unconstitutional because one country was excepted from its operation.

In *State v. Buckley*, 60 Ohio St. 273, 54 N. E. 272, it is said that where a statute required by the Constitution to have uniform operation throughout the state expressly excepts from its operation one or more cities or counties, it is void.

In *State v. Buckley*, 17 Ohio Cir. Ct. R. 86, it is said that, “A general law is one which relates to or binds all within constitutional or territorial limits of the jurisdiction of the law making power. A law is not general, in any correct sense of the term, but is special, where it is suspended in one locality where exists a proper subject-matter on which to operate, but is in full force in another locality of exactly the same kind. The uniformity is in the sense that the law shall operate the same in all parts of the state and must embrace all, and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class.”

In 36 Cyc., p. 992, c., the rule is stated thus: “It is said that the constitutional provisions are satisfied by statutes applying uniformly within a class of persons based on a reasonable distinction, or objects of a reason-

able class, and operating the same on all parts of the state under the same circumstances.

In *City of Vicksburg* 1. Ins. Co., 72 Miss. 71, this court pointed out the distinction between a general law and a local or special law, and held that a law which conferred a power upon all cities of a certain class or kind was a general law, and that if it did not apply to or affect all of that class it was a local law.

We have already shown that said chapter 132 of the Laws of 1906 in said chapter 39 of the Code of 1906 are laws relating to watercourses.

We, therefore, submit that said statutes violate section 90, paragraph q., of the Constitution of the state which provides that the legislature shall not pass local private or special laws relating to watercourses.

We, therefore, respectfully submit that the decree of the court below should be reversed and a decree rendered in this court reinstating and perpetuating the injunction restraining said commissioners and said drainage district from issuing any bonds and that the said decrees and orders levying said tax and making said assessment should be cancelled as clouds upon complainant's title to said land and decreed to be null and void.

E. D. Stone, for appellees.

In this cause the following contentions were raised by the appellant in the original bill:

1st. There was no law to authorize the organization of a drainage district as had been done in the matter of the Code drainage district.

2nd. If there was a law, it was a local law applying to watercourses and therefore unconstitutional.

It is true there were one or two other questions raised and they were subsidiary to one or the other of the different questions, and it seems plain to the appellees that if we had a law that did not fall under condemnation of paragraph q. of section 90 of the Constitution of the

state of Mississippi, everything done by the drainage commissioners was lawful, because the laws of drainage districts were carefully followed in these proceedings. We submit to the court that chapter 39 in the Mississippi Code of 1906 on the subject of drainage district is the law of the state of Mississippi for the reason that it forms a part of the enrolled draft of the said Code which is filed in the office of the secretary of the state. See sections 1 and 2 of the act of adoption of the Code approved April 21st, 1906. Section 1 of chapter 1 of the Code is nothing more than a table of contents of the Code and cannot be controlling in the matter. In the *Nugent case*, 72 Miss. 140, it is expressly held that the law is what is on file in the secretary of state's office, and everything else bearing on the subject of the law, gives way to what we find in the office of the secretary of state. If chapter 39 was named in section 1 of chapter 1 of the Code, it would not have been the law unless it had appeared in the main body of the Code. Chapter 139 is named in section 1, chapter 1 of the Code; but sections 4879 A. and 4897 inclusive were not the law, although these sections were a part of chapter 139 of the Code as passed, because the sections did not appear in the enrolled draft of the Code filed in the secretary of the state's office. And 4898 was a part of the law, because it was in the enrolled draft of the Code.

Should the court hold that chapter 39 is not a part of the Code, appellees contend that chapter 132 of the Laws of 1906 which is almost exactly the same as chapter 39, would authorize all that they have done in the present proceedings and that same was not repealed by the act of adoption or section 3 of the Mississippi Code of 1906, because same would be saved from repeal by section 13 of the act of adoption which is as follows:

"Sec. 13. On and after the first day of October, 1906, all laws of a general character not brought forward and embodied in the Mississippi Code of 1906 shall be there-

after repealed; but this shall not apply to any act of the legislature adopted at the present session thereof.

There can be no merit in the contention of counsel for appellants that the petition must set out the owner of each and every separately described piece of land, because it is evident in the law that there would be several different owners in the district, and section 1687 expressly provides that the notice to be given of the filling of the petition for a drainage district shall state the general description of the land proposed to be included in the district and the boundaries of said district. The record in this case will show that the land was named by sections and parts of sections, when only a part of any section was included, and if a man owned a part of a section, he certainly had full and complete notice when the notice was given that all of the sections in which he owned land was included.

Another contention raised by appellants, that the drainage commissioners had no authority to issue interest coupons payable annually is wholly and entirely without merit. Section 1703 and section 1706 both provide for the payment of interest at not more than six per cent per annum. Then in addition to that, section 1703 provides that for interest assessments to be paid thirty days after same shall be due. The clerk shall certify said assessment to the sheriff and tax collector and he is required to proceed for their collection. Then to make the law full and complete and to furnish a procedure section 1709 provides that the amount of interest due on the bonds shall be levied by the board of supervisors each year.

As to the objection raised that section 1727 exempting certain counties from the operation of this law makes this a local law, I think this objection is not well taken as it is not possible to my mind that because a few isolated counties, hardly any of them contiguous, were left out of the law and the entire state otherwise left in it

would make it local law. But the language of paragraph q. of section 90 does not apply to drainage laws, only to "stock law, watercourses and fences," and we are to look to the wording as well as to the meaning of the drainage law. The Code, section 1693, provides that, "Drainage districts may hereafter be organized in this state for the purpose of reclaiming wet, swamp and overflowed lands for agricultural and sanitary purposes in the manner following." Nothing here is said about watercourses and nothing that gets as nearly to the subject of watercourses as the expression "all natural drains," which caused the court to declare the Belzoni drainage law unconstitutional.

As much as I would like to agree with distinguished counsel on the other side, it is impossible to do so as to the meaning of section 31 of the act of 1906, being section 1712 of the Code, because it says, "The commissioners may, after the organization of said district, do any and all acts that may be necessary in and about the surveying, laying out, constructing and repairing, altering, enlarging, cleaning, protecting and maintaining any drain or ditch or other work for which they have been appointed." This plainly applies only to such ditches as they may lay out under section 1692 and shall have been approved under section 1696. This law no where requires the commissioners to use the natural drains as was required in the Belzoni drainage law. Section 31 of the act of 1906, and section 1712 of the Code must be referred back to sections 2 and 3 of the act of 1906 and sections 1683 and 1684 of the Code, and we will see that these sections do not contemplate the use of natural drains, but always seems to contemplate the construction of drains and ditches for the purpose of reclaiming wet swamp and overflowed lands for agricultural purposes. And when the maintenance of drains and ditches is mentioned in 1684 of the Code which might be applied to natural drains it expressly says "to maintain and

keep in repair any such drains and ditches heretofore constructed." Showing that it is only the drains to be constructed, and not natural drains that our drainage law has in contemplation. Although a natural watercourse may be straightened or deepened as incident to the drainage of a certain territory this will not affect the law, or nullify it, if this change of the natural stream was only an incident to the drainage of the wet or swampy district. In an *Indiana case*, 128 Indiana 399, 27 N. E. 748, the court says, "the primary object of the drainage laws is the reclamation of wet lands, and the power to alter and straighten watercourses (although expressly conferred by statute) is a mere incident; and a proceeding to establish a drain where the primary purpose is to straighten the watercourse and the drainage is a mere incident, is not within the jurisdiction conferred on the courts." We take it that the converse of this would be true, that is that where the object of the proceeding was to reclaim the wet land, and the straightening of a natural drain was only an incident to reclaiming the land, then it would be in the power of the commissioners, acting under the law, to straighten a natural drain, and this would have been so held by the Indiana court. There is another point in this decision that I wish to call to the court's attention and that is that the power to alter and straighten watercourses was expressly conferred by statute in the Indiana law on drainage and no such power is conferred by chapter 39 of the Mississippi Code of 1906. The channelling of streams is covered by sections 371 *et seq.* of the Mississippi Code of 1906 and drainage is an incident, or may be an incident, to the channelling of streams under this section. These sections contemplated the making of channels to prevent the overflow of streams that sometimes overflow, and where it is especially provided that they shall follow, as nearly as practicable, the natural course of the stream. And further provides for the

opening of "new channels." This requirement as to the following the natural channel is nowhere required in the drainage law; this channelling law, section 371 *et seq.*, can apply to a territory that is only occasionally overflowed, but the law on drainage can only apply to land that is wet and swampy to such a degree that it has to be improved or reclaimed for agricultural and sanitary purposes. The drainage law is clearly for the habitually wet and swampy land and has no bearing on water-courses, although as a matter of economy, it might be best to follow them in making a drainage; and to prevent damage to adjacent landowners that might be prevented from closing the natural watercourse in a drainage district. The channelling law, 371 *et seq.* of the Code, is a law where a natural channel is a necessity for the operation of the law. The commissioners being required to follow the natural course of the stream, but the drainage law does not require a stream; in no place does it (371 *et seq.*) contemplate repairing, extending or maintaining such ditches as may have been constructed. It is a maxim of construction that all laws must be upheld where it is possible to uphold both of them. And it has been made so plain that the drainage laws refer to wet and swampy land, and the channelling law refers to land that may be overflowed sometime although not necessarily wet and swampy. It is possible for both laws to be maintained, one to channel streams, and the other to reclaim wet, swampy land for agricultural and sanitary purposes. It has been held that drainage laws are based on the benefit to public health, sanitation, or other public welfare and unless such a reason exists, the proceedings are not properly brought under drainage laws, 145 Ind., p. 372; 26 Mich., p. 22; 17 Cent. Dig. 1539, sec. 2. Nor does a drainage law authorize the draining of public meandered lakes, that is a chain of lakes, 76 Minn. 286, 79th N. W. 112. But both

of these cases could have been upheld under a channeling law.

Another reason why this law, chapter 39 of the Code of 1906, should be upheld is from the fact that chapter 132 of the Laws of 1906 went into effect on April 12th of that year, almost five years ago, and since that time there have been quite a number of drainage districts organized in the state of Mississippi; and more especially is this the case in the delta section of the state. Leflore county having five districts in operation, in two of which the system of drains and ditches have been completed, and in all of which the contracts have been let and the work is in progress. In the county of Bolivar, we are informed that there are several districts in operation, one of which was reviewed, as to the legality of its organization, by this honorable court in the case of *Wilkinson v. Lee*, 51 So. 718. In this district, after the decision of that case, the district was able to sell its bonds to the amount of about two hundred thousand dollars as the commercial world believed that the law had been upheld. Since that time a number of drainage district bonds have been sold in that and other counties, the law has been acted on for nearly five years, property rights have been affected, contracts entered into and a great deal of work done, taxes paid, and the supreme court having upheld the law in the case above cited as to at least three of its questionable points, we feel like it would be a calamity now to hold that the drainage law is a watercourse law, and declare it unconstitutional. In view of the fact that this chapter has been acted upon for several years in view of the obligations entered into on the faith of this law, and especially of the decision above mentioned, we think the reasoning of the court in *Cohn v. Smith*, 64 Miss. 816, should be followed. And the law of *state decisis* should prevail.

We confidently submit this case to the court and ask an affirmance of the decision of the chancellor below.

Chapter 39 of the Mississippi Code of 1906 is the law because it forms a part of the enrolled draft of the Code in the office of secretary of state. The questions of procedure under the law are not ineffectual because the law as written was followed. Chapter 39 of the Code is not a local law, but should the court so hold it to be a local law, it would still not be unconstitutional because it is not a law relating to watercourses.

W. M. Cox, for appellee.

It is contended in this case that chapter 39 of the Code of 1906 is a local and not a general act, for the reason that several counties are excepted from its operation. 2nd. That being a local act, it is void because in conflict with paragraph "q" of section 90 of the Constitution, which forbids the legislature to enact any special or local law relating to fences, watercourses or stock laws, and 3rd. That it never became a law because not in the enrolled draft deposited in the office of the secretary of state to be incorporated in the Code.

If the view be adopted that chapter 39 is a local act, I insist that it does not conflict with paragraph "q" of section 90 and is not unconstitutional and void. I invoke thoroughly established principles of constitutional construction to support which no citation of authorities is needed. They are recognized by all courts, and have been accepted by none more fully than by our own.

To set aside a statute because unconstitutional, involves perhaps the most delicate responsibility with which a court can be charged. A statute which is not clearly unconstitutional, which is not unconstitutional beyond all reasonable doubt, must be upheld. All legal intendments are in its favor. The presumption is that the legislature has not designed to transcend and has not, in fact, transcended its powers. If the statute is open to two constructions, by one of which it would be given an operation violative of constitutional inhibition,

and by the other of which it would be given an operation, even though much restricted, fully within legislative competence, the latter construction must be adopted.

The courts will sanction the work of the legislature as far as possible, and effectuate its purpose fully if this can be done, and if not fully, then as far as it can be done without a clear and palpable violation of the Constitution.

An examination of chapter 39 discloses that it confers no powers whatever to deal with natural watercourses; but that it is designed solely to provide that the creation of artificial channels for the drainage of wet swamp and overflowed lands.

Section 1683 shows the purpose of the act to be the reclaiming of wet, swamp and overflowed lands, for agricultural and sanitary purposes, which is a most enlightened and wholesome public policy, to be encouraged and promoted in every way possible.

Section 1683 provides for the organization of "drainage districts for the construction of drains or ditches across the lands of others for agricultural and sanitary purposes, or to maintain and keep in repair any such drains or ditches, heretofore constructed, or to establish in such district a combined system of drainage or protection from wash or overflow for agricultural and sanitary purposes, and construct and maintain the same by special assessment upon the property benefited thereby."

Section 1686 provides that such system shall consist in the first instance of a system of main drains and ditches for main outlets for all lands of said proposed drainage district.

Section 1706 provides that the drainage engineer shall lay out the main ditches.

Section 1711 provides for a liberal construction of the act to promote ditching, drainage and reclamation of wet, swamp and overflowed lands.

Section 1712 provides that commissioners shall keep drains open in order to thoroughly drain lands.

Section 1713 provides for lateral ditches and tile drains.

Section 1718 provides for use of ditches already constructed.

All these provisions relate not to natural watercourses, but to canals, ditches and artificial drains. The only seeming exception is section 1722 which provides for the removal of bridges where ditches cross roads, railroads and turnpikes. But even this does not necessarily involve the doing of any work upon streams as a part of the drainage scheme. It is a well-known fact that roads, turnpikes and railroads in building over overflowed and swamp ground very often build bridges for passage of overflow water where there are no natural watercourses; and that they often cross ditches and canals which require bridges, and which said ditches and canals might require enlarging.

No power is given or attempted to be given to obstruct watercourses, to divert them, to shorten them, or to diminish their flow. So far as can be gathered from the act they are to be left exactly as nature made them. It will not do to say that as an incident to the system or artificial drainage which alone is contemplated by chapter 39, natural watercourses will in some way be affected. That may be true in some cases, but it is not necessarily true. It is a matter of common knowledge of which the court will take judicial cognizance that there are in the delta and in the valleys of many of our streams large bodies of swamp and overflowed lands that have no drainage by natural watercourses whatever. The water which falls upon them or floods them in overflow can escape only by evaporation or percolation. For such areas the statute in question is especially adapted, and as applied to them is absolutely free from constitutional objection. Nor do I admit that in other cases, even though

the putting into operation of the scheme of drainage provided for in chapter 39 might incidentally affect water-courses, this possible result would defeat the statute. If under color of the statute the commissioners should proceed to create such a system or artificial drains as would necessarily destroy the natural drains, or as would impair the value of streams for agricultural or mechanical purposes, or for navigation, the said commissioners would be acting *ultra vires* and could be restrained by appropriate process by the courts.

The statute simply makes it possible for a group of proprietors to do toward the drainage of a given area of land precisely those things which a single proprietor owning the whole could now do as a matter of right without any aid from the statute, no more and no less.

This court has already declared through Chief Justice Mayes in the Belzoni drainage case, reported in 53 South. Rep., that paragraph "q" of section 90 of the Constitution has no application to local laws providing for artificial drains, then it is impossible for human ingenuity to draft one.

It seems scarcely necessary to argue that section 39 is not rendered nugatory as a piece of legislation merely because it does not appear "in the enrolled draft deposited in the office of the secretary of state." It is a part of the legislation of the session of 1906, and it was not necessary for any of the legislation of that session to be embodied in the Code. Section 13, page 138 of the Code, expressly saves all the legislation of that session from repeal. Besides, if the act be special or local it would be saved from repeal regardless of the time of its enactment.

SMITH, J., delivered the opinion of the court.

The drainage commissioners of Leflore county, being about to issue and sell bonds of the Code drainage district, appellant filed her bill in the court below to enjoin

such issuance and sale. From a decree dismissing the bill, this appeal is taken.

Appellant's first contention is that the chancery court was without jurisdiction to create this drainage district, for the reason that the original petition praying for the creation thereof does not "set forth or show the names of the owners of the several tracts of land mentioned therein to be embraced in said district," as provided by section 1684 of the Code, and by section 3, chapter 132, of the acts of 1906. These sections provide that the petition shall set forth the proposed name of the drainage district, the necessity therefor, with the description of the lands to be included in said drainage district, of the name of the owners when known, together with the postoffice address of such owners if the same can be ascertained. This petition in one paragraph described the land to be embraced within the district, and in the paragraph next following recited that the lands embraced in the proposed drainage district were owned by the following named persons, with the postoffice address of each following his name, and then follows a list of all landowners, with their postoffice address, without stating what particular land was owned by each landowner. This we think was a sufficient compliance with the statute.

Appellant next contends that these bonds have attached to them annual interest coupons, that the commissioners are without authority to issue bonds providing for the payment of interest annually, and no power is anywhere vested for the levying of the tax necessary for the payment of this interest. This position is not tenable. Sections 1703 and 1706 of the Code and the corresponding sections of the act of 1906 authorize the payment of interest on these bonds, and section 1709 of the Code and the corresponding section of the act of 1906 provide both for the payment of this interest annually and for

the collection of the money necessary so to do by "assessments" made by the board of supervisors.

Appellant's next contention is that chapter 39, Code of 1906, is no part of the public laws of the state, for the reason that this chapter was omitted from section 1, chapter 1, of the Code, which section designated what chapters should constitute the Code; that chapter 132 of the Laws of 1906 has been repealed by implication by sections 371 to 391, inclusive, of the Code; and that consequently we have no law authorizing the creation of drainage districts of the character of the one here in question. The Code consists of the matter included in the enrolled bill containing same filed in the office of the secretary of state, and this enrolled bill includes chapter 39. There is, therefore, no merit in this contention of appellant.

Section 90, paragraph "q," of our Constitution, provides that the legislature shall not pass local, private, or special laws relating to watercourses, and section 1727 of the Code and section 46 of chapter 132 of the acts of 1906 exempt the counties of Sharkey, Issaquena, Lauderdale, Amite, Wilkinson, Warren, Choctaw, Tippah and Union from the provisions of this statute; and appellant next contends that these statutes are local, relate to watercourses, and therefore violate this section of the Constitution. This section of the Constitution, as was held in *Belzoni Drainage Commission v. Winn*, 53 South. 778, deals with natural, and not artificial, watercourses. The statutes under consideration confer no power upon the commissioners to deal with natural watercourses, but are designed solely for the purpose of creating artificial channels for the drainage of wet, swamp, and overflow lands. It is immaterial, therefore, whether these statutes are local or general.

Affirmed.

CARL MITCHELL v. STATE.

[55 South. 354.]

1. CARRYING CONCEALED WEAPONS. *Pistol. Instructions.*

In a prosecution for carrying a concealed weapon, it was not error for the court to grant an instruction for the state, "that if the defendant carried concealed in whole, or in part, a pistol which was defective, in that it did not have a mainspring or a hammer, the jury should find the defendant guilty as charged.

2. SAME.

An object once a pistol does not cease to be one by becoming temporarily inefficient.

APPEAL from the circuit court of Covington county.

HON. W. H. HUGHES, Judge.

Carl Mitchell was convicted of carrying concealed weapons and appeals.

The facts are stated in the opinion of the court.

W. L. Cranford, for appellant.

The evidence shows conclusively that the pistol carried by appellant had no hammer nor mainspring, both of which are necessary to make it a deadly weapon. The carrying a piece or a part of a pistol, concealed in whole or in part, is not an indictable offense.

Appellant contends that the pistol had lost so many of its vital parts, that it was no longer a firearm and was absolutely incapable of such. A pistol to be within the meaning of the statute and the danger sought to be prevented, must have all or so many of its vital and necessary parts that it may be carried and used as a deadly weapon.

This pistol was wholly incapable of being fired off, hence it follows, it can not be a pistol or deadly weapon as contemplated by statute.

This phase of the case was asked by the defendant in the court below to be given to the jury by special instructions, that if these facts were believed by the jury to be true, defendant should be acquitted, and the court erred in not giving these instructions. See *Underwood v. State*, 29 So. Rep., 777; *Evins v. State*, 46 Ala. 88-9; *Cook v. State*, Tex. App. Reports, vol. 11, p. 19.

Jas. R. McDowell, assistant attorney-general, for appellee.

Our statute, section 1103, Code of 1906, makes it a misdemeanor to carry a pistol concealed in whole or in part. This has no reference to whether the pistol is a deadly weapon as carried, or whether it could be used in its present condition. Our court has held in the case of the *State v. Bollis*, 73 Miss. 57, that a pistol need not be loaded.

It is sought in the instant case, to instruct the jury that if the pistol in question had no mainspring, or lacked any other vital part, it was not a deadly weapon, as contemplated by the statute, as it was incapable of inflicting death.

The court will hold, in my opinion, that a pistol is a deadly weapon, *per se*, and it is not necessary, like it would be, were it a pocket knife, to show the manner of its use, or purpose of its carrying, but simply to show that it was a pistol. A pistol without a trigger is just as dangerous, as an unloaded pistol. Our statute is intended to prevent the carrying of a concealed pistol, whether a deadly weapon or not. It is made a deadly weapon by the statute. One could commit robbery, or any other crime, by the use of a pistol which was minus a mainspring. If such trivial defense were allowed to be interposed, every defendant on trial would take the stand in his own behalf and testify that it was defective. He could load it and have it ready for action, and then testify that the trigger would not work and escape scott

free. Our statute is made to accomplish a purpose, and it is hard enough to enforce without imposing the additional burden of showing that it was ready for action.

In contradiction to the case cited by appellant, I invite the court to read the following case. "It is no excuse for one to carry a concealed pistol, that the mainspring of the lock is broken." *Williams v. State*, 61 Ga. 417. The Alabama court held under a statute similar to ours that a pistol so battered up that it cannot be discharged by the trigger was one within the meaning of the statute. *Howard v. State*, 58 Ala. 508. See also *Hutchinson v. State*, 62 Ala. 3; *Redus v. State*, 82 Ala. 53.

Our court should follow the evident purpose of the statute, and hold that a defect in the pistol is no defense for carrying it. The defendant had no business with this pistol. The greatest evil in our state is the unlawful carrying of concealed weapons, and when the legislature, in its wisdom, tries to stamp it out, the courts should unhesitatingly give their assistance. This court has already set the example in the Hollis case by holding that a pistol need not be loaded. See also *Gambin v. State*, 45 Miss. 658; *State v. Dugan*, 6 Blackf. (Ind.) 31:

McLAIN, C.

Appellant was indicted, tried, convicted, and sentenced in the circuit court of Covington county for carrying a pistol concealed. From this judgment, he appeals to this court.

In the trial court, the evidence shows that appellant carried a pistol concealed, and that it had no hammer or mainspring. Appellant contended that it was not a pistol within the meaning of the statute. The state, on the other hand, contended that it was. This was the chief issue on the trial. Upon the trial the defendant requested the court to instruct the jury that, if the pistol

alleged to have been carried by defendant had no hammer or mainspring, then the same was not a pistol. This was refused by the court. The state requested of the court that if the defendant carried concealed, in whole or in part, a pistol which was defective, in that it did not have a mainspring or a hammer, the jury should find the defendant guilty as charged. This was given.

In the refusing of the one and the giving of the other the court was correct, and the ruling was clearly within the meaning and policy of our statute. Evidently to hold otherwise will go far towards nullifying the beneficent purpose of the law. In the condition in which this pistol was proved to be, by the holding of some authorities, it would not come within the purview and meaning of our statute. One of the leading cases holding this view is the case of *Evins v. State*, 46 Ala. 88. The weight of authority is clearly against this view, and we decline to follow it. Bishop on Statutory Crimes, section 791, says: "By what appears to be the better opinion, if it has no mainspring, or only a broken one, and if it cannot be discharged in the ordinary way, yet can be by a match, it is still a pistol within the statute, though the contrary was once held."

In passing upon a statute similar to ours, the supreme court of Georgia in a well-considered case said: "What is the meaning of 'any pistol?' This is the sole question. 'Pistol' is a word in general use by the whole population, and is consequently to be understood in its ordinary signification. An object, once a pistol, does not cease to be one by becoming temporarily inefficient. Its order and condition may vary from time to time, without changing its essential nature or character. Its machinery may be more or less perfect. At one time it may be loaded; at another, empty. It may be capped or uncapped; it may be easy to discharge or difficult to discharge, or not capable, for the time, of being discharged at all; still, while it retains the general characteristics

and appearance of a pistol, it is a pistol, and so in common speech would it be denominated. The mainspring being disabled, so as to render a discharge of the weapon impossible in the ordinary mode of using firearms, is no excuse or justification; concealment in carrying being interdicted by the statute, whether the machinery of the lock be sound or unsound." *Williams v. State of Georgia*, 61 Ga. 418, 34 Am. Rep. 102.

We think the case should be affirmed. *Affirmed.*

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the case is affirmed.

GEO. HAYES ET AL. v. SLIDELL LIQUOR CO.

[55 South. 356.]

1. SUPREME COURT. *Appeal. Motion for new trial. Recoupment. Peremptory instruction. Trial.*

The general rule is that alleged errors of the trial court, occurring during the trial, will not be revised on appeal, unless such errors have been called to the attention of the trial court in a motion for a new trial.

2. SAME.

Error in giving a peremptory instruction is analogous to a demurrer to the evidence and is reviewable on appeal, although no motion for a new trial was made in the trial court.

3. RECOUPMENT. *Set-off.*

Recoupment is distinguished from set-off in these particulars:

1st. It arises out of matters connected with the transaction or contract on which the plaintiff's cause of action is founded.

2nd. It matters not whether it be liquidated or unliquidated.

3rd. It is not dependent on any statutory regulation, but is controlled by the principles of the common law.

4. PEREMPTORY INSTRUCTIONS.

Where the evidence tends to establish a legal defense, a peremptory instruction should not be given against the defendant.

APPEAL from the circuit court of Lamar county.

HON. A. E. WEATHERSBY, Judge.

Suit by the Slidell Liquor Company against Hayes et al. From a judgment for plaintiff, defendant appeals. The facts are fully stated in the opinion of the court.

J. T. Garroway, for appellants.

This is a case where the Slidell Liquor Company brought suit against George and C. H. Hayes for the sum of \$78.25 on an itemized bill of goods, the principal amount being for a certain lot of phosphate, which the appellants claim they bought from the appellee, and that the appellee guaranteed was not intoxicating and that he would stand any loss that the appellant might sustain in case the goods were intoxicating, and the defense to this suit was that the appellant sustained damages in a greater sum than the appellee was suing for which defense is clearly set up in a plea of recoupment (see plea of recoupment). This case was tried at the July, 1910, term of the circuit court of Lamar county, and a peremptory instruction given for the plaintiff below for the full amount from which judgment the defendant prosecutes this appeal.

Recoupment was the proper remedy under the facts in this case, and this remedy is not denied nor was it objected to in the trial court and the testimony of the defendant below and the witness Steve Brown substantiates the facts set up in the plea of recoupment, and the same was a question of facts that should have been submitted to the jury, and it was error for the trial court to have given a peremptory instruction. See *Myers v. Estell*, 47 Miss. 4. The appellant's plea of recoupment sets up certain facts among which he claims that the

appellee agreed to sell him a lot of phosphate and guaranteed that it was not alcoholic, and that if he should sustain any loss as a result of same being intoxicating that he would stand between him, and the law, and that he relied upon the statements and representations of the appellee and that afterwards the officers of the federal government visited the place of business of the appellant, and found the goods and analyzed same and found them to be intoxicating and in violation of the state and federal laws, and that appellant was forced to pay out the sum of ninety-six dollars, and no one denies that the appellant paid out this sum of money for the handling of this beverage. It is true that Plant, the owner of the Slidell Liquor Company, appellee, denies making any guarantee of the goods being non-alcoholic, or that he would stand any loss as a result of the law, but this was a controversy of fact that was solely within the province of the jury to pass upon. The testimony of George Hayes shows conclusively that the phosphate sued upon was intoxicating, and he was compelled to discontinue handling it. It is also testified to by the witness, Steve Brown, that it had the same effect that whiskey would, and if this was true or would have been believed by the jury then the appellant would have been entitled to whatever amount of damages he sustained, since it did not exceed the amount that he was sued upon. See *Myes v. Estell*, 47 Miss. 4, and *Raymond v. State*, 54 Miss. 562. Again the record of testimony shows that the defendant was prevented from telling all about the transaction between himself and the plaintiff on account of the many objections made by the plaintiff, and sustained by the court, all of which the defendant should have been permitted to tell about and have submitted to the jury which was denied.

We submit that there is not to be found a case that will warrant a court in granting a peremptory instruction where there is as sharp conflict in the testimony as

there is in this case, and we submit to affirm this case would mean to write new law, and take away from the jury their right to pass upon the weight of testimony and the credibility of witnesses. Where there is a material conflict of evidence, a peremptory instruction should not be given. *Richardson v. Toliver*, 71 Miss. 966; *Thrasher v. Gillispie*, 52 Miss. 840; *Catrell v. Railroad Co.*, 69 Miss. 435; *Timberlake v. Compress Co.*, 72 Miss. 323.

A peremptory instruction is proper only where all the facts in evidence taken as true with every just inference from them fail to maintain the issue. *Whitney v. Cook*, 53 Miss. 551.

Where the plaintiff's evidence does not conduce to prove the cause of action the court may instruct for the defendant. Such power should not be exercised except in cases where there is no room for doubt, as in case of a demurrer to evidence such instruction should not be given, if the evidence taken as wholly true proves, or fairly tends to prove the case. *Swain v. Insurance Co.*, 52 Miss. 704.

And if there is any conflict in the evidence the view which is most favorable to the party against whom the instruction is asked must be taken as true. *Carson v. Leathers*, 57 Miss. 650.

If there is any evidence tending to sustain or support the grounds of an attachment and upon which the jury might find for the plaintiff, it is error to give a peremptory instruction for the defendant. *Lowenstein v. Powell*, 68 Miss. 73. Also, *Doyle v. Railroad Co.*, 60 Miss. 977.

C. G. Mayson, for appellee.

Appellants in their second and third assignments of error complain of the exclusion of certain proffered testimony. The action of the court was manifestly correct. It will be observed that the appellants elected to present the grounds of their defense in a written plea. That they

could do so if they wished, but having chosen that method, they are held to that degree of strictness in pleading that would be required in a court where written pleadings are necessary. The proposed testimony sought to establish matters not pleaded and was, of course, properly excluded. The plea sets forth that the beverage was analyzed and found to be intoxicating and that there was then a breach of warranty. The record will be searched in vain to discover even a semblance of testimony of that character, yet that was affirmative matter, a necessary element in the defense and necessary to be proven in order to establish the defense. It will also be seen that if any representation of the non-alcoholic or non-intoxicating qualities of any beverage was made, it was made with reference to the initial sale—goods long since consumed before that in question had been sold and delivered.

After the alleged seizure the appellants made no effort to restore the *status quo ante*. If they desired to rescind the contract of sale, it was their duty to return the goods to the seller, or to place him as nearly in the condition that he was in before the sale as possible.

Their own acts show that they did not even repudiate the contract of sale. If any guarantee was in fact made, they waived it. They made sundry payments on the account after the trouble arose. Should it be contended that such a case is made as would entitle the appellants to damage, there is nothing by which the measure could be determined. Hayes says he paid ninety-six dollars for some purpose, but for what purpose cannot be determined. Whether all or merely a part is legitimate damage, it is impossible to ascertain. Surely the items of damage are not even certain to a common intent. We do not know how much, if any, revenue license was paid. If the appellants paid the revenue license and desired to rescind the sale it was their duty to return such of

the goods as they had on hand. *Ware v. Houghton*, 41 Miss. 370.

If a breach of warranty in the sale of goods is relied on to defeat the action for their purchase price, the purchaser must return or offer to return them in a reasonable time after the discovery of the breach, unless the goods are valueless. *Eastern Granite Roofing Co. v. Chapman & Co.*, 140 Ala. 440, 37 So. 1991, 103 Am. St. Rep. 58.

Upon a view of the record of this case it will be seen that the court did right in directing a verdict for the appellee.

McWillie & Thompson, for appellee.

On the trial of this case, the plaintiff moved to exclude all of the defendant's evidence and for a peremptory instruction, and the court below sustained the motion and defendant excepted.

The granting of the peremptory charge to find for the plaintiff followed as the corollary of the exclusion of all of the defendants' evidence, and the matter was really one, therefore, involving the exclusion of evidence. In other words, the evidence for defendant being excluded there was no course open to the jury except to find for the plaintiff.

No motion for a new trial was made by the defendants, and they rely on the fact that the stenographer's notes show that they excepted to the above ruling as being sufficient to warrant this court in reviewing the same. This court is firmly committed to the doctrine that the court below must be given opportunity to correct its own errors, and that exceptions to the exclusion of evidence will not be considered unless made the ground of a motion for a new trial. *Richburger v. State*, 90 Miss. 806; *Day v. State*, 91 Miss. 239; *Carpenter v. Savage*, 93 Miss. 233.

There is nothing in the act of 1910 (laws, p. 93), or any other statute dispensing with motions for new trials, or altering their office and nature in any way.

ANDERSON, J., delivered the opinion of the court.

The appellee, the Slidell Liquor Company, sued appellants, George and C. H. Hayes, for a balance claimed to be due by appellants to appellee on open account. There was a verdict and judgment for appellee, from which appellants prosecute this appeal.

Appellants admitted the correctness of the amount sued on, but interposed thereto the following plea of recoupment: "Come the defendants and for plea in their behalf say that they do not deem themselves indebted to the Slidell Liquor Company, or under any obligation to pay any sum whatever; that in truth and in fact the plaintiffs in this cause are justly indebted to the defendants in the sum of \$36.00 (thirty-six dollars); that whereas, heretofore, to wit, about two (2) years ago the plaintiffs, through one of their agents, approached defendants, and insisted upon defendants taking a shipment of phosphate, that defendants did not desire at that time and refused to accept, but by persistent efforts on the part of the plaintiff, through their agent, that the goods were harmless and non-intoxicating, the defendants agreed to accept sixty dollars worth of said phosphate, solely upon the representation, statements, and promises, and the guaranty of the plaintiffs that the same were non-alcoholic, all of which representations, statements and promises were knowingly and willfully made by the agent of said plaintiffs; and that afterwards, to wit, about ——— months from the date of the purchase, one of the officers of the United States federal government entered the place of defendant and analyzed said phosphate, and it proved then and there alcoholic and in violation of the United States federal law, the state laws, and the laws of the municipality; and that, as a result of said investi-

gation by said federal officer, defendants herein were forced by the laws of the federal government, to prevent rigid enforcement of the law and imprisonment, to pay out the sum of ninety-six dollars in good and lawful money of the United States, all of which was caused by the fraudulent representations and misrepresentations and statements made by the plaintiffs' agent herein, and by reason of said statements, which were knowingly and fraudulently made, the defendants herein have paid out thirty-six dollars more than they are due plaintiffs. Wherefore they counterclaim and recoup and set off said indebtedness."

Appellee joined issue on this plea, and after all the testimony was in for both appellants and appellee the court instructed the jury to return a verdict in favor of appellee, which was done, and judgment entered accordingly. The action of the court in granting this instruction constitutes the only assignment of error in this court. There was no motion for a new trial by appellants. All the testimony was embodied in a bill of exceptions, which is in the record, and which shows that, at the conclusion of the testimony, appellee moved the court to exclude all of appellants' testimony, and for a peremptory instruction to the jury to return a verdict in appellee's favor, which motion was sustained, to which action of the court appellants excepted.

It is contended on behalf of appellee that the action of the court below, in granting the instruction to the jury to return a verdict in its favor, is not reviewable by this court, because of the failure of appellants to enter a motion for a new trial, assigning therein such action of the court as a ground of the motion. The general rule is that alleged errors of the trial court, occurring during the trial, will not be reviewed on appeal, unless such errors have been called to the attention of the trial court in a motion for a new trial, in which they are assigned as grounds of the motion, and an opportunity

thus given to correct them, followed by a judgment overruling such motion. *Armstrong v. Whitehead*, 81 Miss. 35, 32 South. 917. This rule, however, is not universal. It was held in *Nicholson v. Karpe*, 58 Miss. 34, that where a jury is waived, and the questions of law and fact submitted to the judge for adjudication, "a general bill of exceptions, embodying all the testimony, may be taken to his judgment, which will be considered by this court, although no motion for a new trial is made or acted upon in the court." It is said in 14 Ency. Pl. & Pr., p. 850: "It has been held that a ruling on a demurrer to the evidence is a decision occurring at the trial, and therefore a motion for a new trial is necessary to secure a review. The weight of authority, however, is that such decision is a judgment which may be reviewed without a motion for a new trial, except as to error in the assessment of damages."

We approve the authorities holding to the latter view as declaring a more reasonable rule than those holding to the contrary. The giving of a peremptory instruction is analogous to a demurrer to the evidence. Such an instruction raises the question whether the evidence as a whole, and every reasonable inference therefrom, taken as true, tends to establish the cause, or defense, as the case may be. In determining whether such an instruction shall be given, the trial judge adjudicates both questions of law and fact, which are effectually brought to his attention as if they were embodied in a motion for a new trial. In such a case, the reason for requiring a motion for a new trial fails. There is no more reason for such a motion, in order to have the question reviewed on appeal, than in a case where a jury is waived and the judge adjudicates the questions of law and fact.

"Recoupment is distinguished from set-off in these particulars: First, it arises out of matters connected with the transaction or contract on which the plaintiff's cause of action is founded; second, it matters not whether

Brief for appellants.

[99 Miss.]

it be liquidated or unliquidated; third, it is not dependent on any statutory regulation, but is controlled by the principles of the common law." *Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382; *Myers v. Estell*, 47 Miss. 4.

The evidence offered on behalf of appellants tended to establish the fact set out in their plea of recoupment, and was sufficient, therefore, to go to the jury on the issue raised by the plea. The court below erred in directing the jury peremptorily to return a verdict of appellee.

Reversed and remanded.

A. R. MEBANE ET AL. v. VILLAGE OF HICKORY FLAT.

[55 South. 359.]

SCHOOL DISTRICTS. *Creation. Code 1906, section 4530.*

Under Code 1906, section 4530, a municipality may create a separate school district without reference to any petition of the qualified electors therein, and it is not necessary, in order that a separate school district shall be established by a municipality, that it be shown that the district can maintain a school term of seven months.

APPEAL from the chancery court of Benton county.

HON. I. T. BLOUNT, Chancellor.

Suit by the village of Hickory Flat against A. R. Mebane et al. From a judgment for plaintiff, defendant appeals.

The facts are sufficiently stated in the opinion of the court.

Smith & Totten and *E. C. Wright*, for appellants.

Section 4530 of the Code 1906 provides as follows: "Any municipality by an ordinance of the mayor and board of aldermen thereof, or any unincorporated dis-

trict of less than sixteen square miles, by the county school board on a petition of the majority of the qualified electors therein, may be declared a separate school district," etc.

It is contended that this section does not require a petition of a majority of the qualified electors of a municipality to authorize the mayor and board of aldermen thereof to declare the municipality a separate school district; but that this provision requiring a majority of the qualified electors only applies to an unincorporated district; that a municipality can declare itself a separate school district by simply passing an ordinance to that effect. We *do not* so understand the statute. Our construction of this statute is this: That it means that municipalities and unincorporated districts can only be declared separate school districts precisely in the same manner, viz., on a petition of a majority of the qualified electors therein, presented to either the authorities of the municipality, or the authorities of the unincorporated districts. And the mayor and board of aldermen of the village in attempting to pass these ordinances proceeded on this construction of the law. This construction that we have placed upon this section of the law, we think is strengthened by the fact that section 4011 of the Code 1892 absolutely prohibited a municipality of less than three hundred inhabitants from becoming a separate school district, but the Code of 1906, section 4530, left it to the election of a majority of the qualified electors of a municipality to say whether it would become a separate school district or not. If we are correct in this contention then the mayor and board of aldermen of this village were without authority on the 1st day of March, 1910, to declare the village of Hickory Flat a separate school district, because on that date they did not have before them a petition signed by a majority of the qualified electors of the village asking that the village be made a separate school district.

The said ordinances are also void because they are unreasonable in this: That the municipality will not yield sufficient revenue to support the purposes for which they were passed. Section 3317 of the Code provides, "But a village of less than three hundred inhabitants shall never levy a tax on real and personal property to exceed for all purposes four mills on the dollar;" section 4534 of the Code provides that the mayor and board of aldermen of the municipality constituting a separate school district . . . shall annually levy a tax to pay for fuel, etc., for a public free school, . . . but a tax in excess of three mills on the dollar shall not be levied or collected without the consent of a majority of the taxpayers of the municipality." We contend that the provision in section 3317 of the Code as to the four mill levy is emphatic and prohibitory from the levy of any taxes whatever on the real and personal property of the village in excess of four mills on the dollar. Section 4530, perhaps, permits a municipality of three hundred inhabitants to become a separate school district, but when the village is so declared such separate school district, the schools must be supported for the length of time with the revenues derived alone from the four mill levy provided for in section 3317 supplemented by the common school fund, and such other funds as hereinafter stated in this case, and, in this instant case it would require more funds to conduct the school for the time prescribed by law than the entire four mill levy authorized by law would raise supplemented by the other revenues that would come into the village treasury from other sources as will hereinafter appear, and would leave nothing to meet the governmental expenses of the village. The assessed value real and personal in the village including railroad property is eighty-seven thousand, five hundred and eighty-six dollars. A three mill tax on this amount of property is two hundred forty-two dollars and seventy-five cents; the village would receive from the common

school fund one hundred ninety-two dollars, and from the Chicwasaw school fund, fifty dollars and from poll taxes forty-seven dollars, making a total of five hundred thirty-one dollars and seventy-five cents from all sources in revenue for school purposes that the village can possibly raise, thus leaving one mill for governmental purpose; surely this cannot be sufficient revenue to maintain the schools for white and colored in the village for seven months, to say nothing of the erection of school buildings at a minimum of cost of fifteen hundred dollars, according to J. C. Bright's testimony, and for the additional cost for fuel and other necessary expenses incident to the proper conduct of such schools. So, it must appear to the court the utter folly of attempting to carry out and enforce an impossible undertaking. Especially is this condition of the case magnified when it will appear from the testimony of J. C. Bright that the village is now in debt in an amount greater than a four mill levy can pay.

It was contended in the court below that the four mill levy was confined by the statute only to the levy of taxes for general municipal or governmental purposes, and that in addition to the four mill levy for that purpose the village could levy an additional tax of three mills for school purposes. Section 4534 of the Code requires that the mayor and board of aldermen shall levy a tax to support and maintain the separate school district; but it does not provide that this three mill tax shall be additional to the taxes provided for in section 3317. We contend that section 3317 restricts the powers of municipalities from levying greater taxes than there provided, except by a consent of the taxpayers. Laws authorizing the levying of taxes are strictly construed. *Am. and Eng. Ency. Law* (2d Ed.), vol. 27, p. 870.

The remedy of the municipality in aid of a longer term of school therein is provided for by chapter 127 of the *Laws of Mississippi*, 1908.

In conclusion we do submit that there is nothing whatever to show that there are any ordinances passed by the mayor and board of aldermen whatever in regard to taxation that are valid; because the foundation for the taxing powers of the board does not exist, as there are no established limits to the village specifying upon what property within definite limits a valid levy can be made; that the alleged ordinances declaring the village a separate school district are unreasonable and void for the reasons hereinbefore presented, and we insist that we do not think that the court will undertake to enforce such ordinances passed by a board so utterly incompetent to transact the business of the municipality that this board is shown by the record to be, and especially when the enforcement of these reckless proceedings would jeopardize the school facilities of the village already established, and would be taking the property of the citizens without adequate returns in benefit. It verily seems that it would not be going too far to say that the village is without any form of municipal government whatever. We earnestly submit that the decree should be reversed, and a decree entered in this court for appellants as prayed for in the bill.

C. Lee Crum, for appellees.

As stated in the abstract of the case appellants make the following contentions:

The resources of the Village of Hickory Flat are not sufficient under the law regulating and limiting the rate of taxation to enable it to operate a separate school district as required for seven months in each year.

But the contention of appellants that the courts have power to review the board's action I submit is unsound. Section 4530, Code 1906, delegates the decision of the question of the creation of a separate school district in a municipality to the mayor and board of aldermen thereof, and where the board has acted in good faith in the ex-

ercise of this discretion, a court has no authority to enjoin the action of the board. The provision of the section denies to the municipality the rights and privileges of a separate school district when the authorities fail to maintain a free public school for seven months or more in each year therein, thus making the ordinance creating the district self-nugatory and void by the operation of the law authorizing the creation of the district. If the Village of Hickory Flat cannot by lawful levy maintain a free public school for seven months in any year it will by operation of this section be deprived of the privilege of a separate school district, without the intervention of an order from any court. It is therefore the contention here that the mayor and board of aldermen have reposed, in them as a body sole discretion as to the propriety and feasibility of creating a separate school district and as long as this discretion is not abused by bad faith on the part of the board the courts have no jurisdiction to interfere and enjoin such action of the board as is otherwise authorized by law. No bad faith is alleged and certainly none shown by the proof to have existed.

The section is as follows, and speaks for itself on this proposition, as well as upon the second contention of appellants.

“4530. Separate School Districts.—Any municipality, by an ordinance of the mayor and board of aldermen thereof, or any incorporated district of not less than sixteen square miles, by the county school board, on a petition of the majority of the qualified electors therein, may be declared a separate school district, but shall not be entitled to the rights and privileges of a separate school district unless a free public school shall be maintained therein for a term of at least seven months in each scholastic year.”

The appellees take the position, which is carefully set forth in their answer, that in a municipality, a petition is necessary to authorize the mayor and board of

aldermen to declare by ordinance a separate school district.

Section 4011, Code 1892, did not require any petition. At that time there was no authority in the statutes anywhere for the formation of a separate school district of unincorporated territory. When the law was amended so as to authorize the county school board to create a separate school district of unincorporated territory, the phrase "on a petition of a majority of the qualified electors therein" was inserted after reference to unincorporated territory, and was intended to qualify only that, and was not designed to take from the mayor and board of aldermen of municipalities any of their powers theretofore delegated to them. The same punctuation precedes and follows this phrase in reference to the same things in section 4531, Code 1906, which is in the next following section to the one under construction. The same form and punctuation is adhered to in the amendment of section 4531, found in Laws 1910, page 218. This construction is in exact accord with official opinion of our present able attorney-general construing section 4530, Code, and which is here referred to as persuasive on this point. I, therefore, conclude there is no merit in second contention of appellants.

MAYES, C. J., delivered the opinion of the court.

We do not think any of the questions in this case require consideration other than the ones which we shall mention. By section 4530, Code of 1906, it is provided that "any municipality, by an ordinance of the mayor and board of aldermen thereof, or any unincorporated district of not less than sixteen square miles, by the county school board, on a petition of a majority of the qualified electors therein, may be declared a separate school district, but shall not be entitled to the rights and privileges of a separate school district unless a free public school shall be maintained therein for a term of at

least seven months in each scolastic year." It is contended, under this section, that a municipality cannot establish a separate school district, unless petitioned so to do by a majority of the qualified electors therein. It is also contended that, before a separate school district may be established, it must be shown that the municipality has sufficient property on which to levy a tax to raise revenue sufficient to maintain the school for seven months. We notice only these contentions, since the record answers all others.

As to the first one, it is plain, from the statute, that a municipality may create a separate school district without reference to any petition of the qualified electors therein. Section 4530, Code of 1906, is a rescript of section 4011 of the Code of 1892, except that in the Code of 1906 provision is made for the first time for the establishment of a separate school district in unincorporated territory. Under section 4011, Code of 1892, this could not be done. That our conclusion as to this is correct becomes clear by referring to section 4011, Code of 1892. Section 4011, Code of 1892, provided that any municipality of three hundred or more inhabitants could be declared a separate school district by an ordinance of the mayor and board of aldermen, and nothing was there said about any petition from the qualified electors. In adopting the Code of 1906 no change in the law was made as to this, but a new right was given to unincorporated territory to form itself into a separate school district by a petition of a majority of the qualified electors acting through the county school board. In unincorporated territory, it was necessary for the initiative to be taken by somebody, and since in this unincorporated territory there was no one to take this initiative except the qualified electors, it was but natural that it should be confided to them; and since it was necessary for some one to have the authority to say whether or not the petition had a majority, and to declare the separate school

district created, this power was confided to the county school board of the county.

It is not necessary, in order that a separate school district shall be established by the municipality, that it be shown that the district can maintain a school for a term of seven months. The district may be created without this showing being made; but the statute provides its own penalty where a separate school district fails to maintain a school for a term of seven months in each scholastic year. If the separate school district fail to maintain a school for the term required by the statute, it is not then entitled to the rights and privileges of a separate school district; but the power to so declare it is not affected in any way, and, when so declared, it will be a separate school district as soon as the school is maintained for the period of time required.

Affirmed.

D. S. JONES, EXECUTOR ESTATE OF B. L. JONES, DECEASED,
ET AL. v. MRS. M. V. JONES.

[55 South. 361.]

1. EQUITY. *Bill. Multifariousness. Husband and wife. Partners. General demurrer. Code 1906, section 2517.*

Where a bill in chancery by the widow against the executor of her deceased husband charged that at the time of her marriage, her deceased husband was the manager of her plantation and that the plantation business and all other business conducted by her husband was a partnership business in which she equally shared and that all of the earnings of her husband comprising his entire estate were partnership property and owned jointly by her husband and herself in accordance with a partnership agreement between them, made after their marriage, that her husband made a will which she renounced. The prayer of the bill was for an accounting of all the

business transactions had by the husband during the period of their married life, embracing numerous business enterprises in which her husband ventured in his own name and various partnerships and corporations in which her husband was interested, and that certificates of stock in such corporations held in the name of decedent, be declared partnership property and that an accounting be made of all expenditures and improvements and that the rights of the parties be fixed. *Held* that the bill was not multifarious.

2. CODE 1906, Section 2517. *Disabilities of coverture. Partnership.*

Since under Code of 1906, section 2517, all of the disabilities of coverture have been removed, a married woman may lawfully enter into a partnership with her husband.

3. GENERAL DEMURRER. *Equity pleading.*

Grounds of demurrer which do not go to the whole bill cannot be considered on the hearing of a general demurrer to the bill.

APPEAL from the chancery court of Leflore county.

HON. M. E. DENTON, Chancellor.

Suit by Mrs. M. V. Jones against D. S. Jones, executor of the estate of B. L. Jones, deceased et al. From a judgment overruling a demurrer to the bill, defendant appeals.

The facts are as follows:

This suit was begun by the appellee, who was complainant in the court below, against the appellant, the executor of the estate of complainants deceased husband. The appellee alleges that the complainant married B. L. Jones many years ago, and at the time of their marriage he was manager of her plantation; she being a woman of considerable means. She alleges that the plantation business, mercantile business, and various other enterprises engaged in by her husband were conducted as a partnership business, in which she and her husband equally shared, and that all of the earnings of her husband, which comprised his vast estate at the time of his death, were in truth partnership property, being owned jointly by herself and husband in accordance with their partnership agreement, entered into soon after they married.

The declaration further sets up that under the will of her husband he bequeaths to her one-half of the cash on hand, and divides the balance of his estate among his own brothers and sisters; the will itself reciting the complainant has a separate estate equal to that of the decedent, giving this as his reason for bequeathing his property to members of his own family; that complainant, as his widow, renounced the will and elected to take her share, one-half of the estate, there being no living children from the union. The prayer of the bill is for an accounting of all the business transactions had by the defendant during the period of their married life, embracing numerous business enterprises in which the decedent ventured in his own name, and various partnerships and corporations in which the decedent was interested, and prayed that certificates of stock in such corporations, held in the name of said decedent, be declared the partnership property, and that an accounting be made of all expenditures and improvements of various plantation properties, and the rights of all parties interested be fixed. The demurrer filed by the executor raised two questions: (1) That it was multifarious; (2) that the wife had no right to enter into a partnership agreement with her husband. The court overruled the demurrer, and the executor appeals.

Coleman & McClurg, for appellants.

"The uniting in one bill of several distinct and unconnected matters against the same defendants shall not be an objection to the bill." Code, 598. This means, of course, that the uniting of several distinct and unconnected matters against several distinct and unconnected defendants as to distinct and unconnected matters, is an objection to the bill.

Recalling that there are four separate and distinct complainants although in one person, against twelve distinct and diverse persons and corporations as defend-

ants, and innumerable subject-matters alleged against each of them, some jointly and some severally, we take up the tedious task of shortly briefing the complaint.

Paragraph 1 of the bill:

The first issue tendered by the bill is that Highland plantation was well stocked with a large number of mules, horses, cattle, wagons, agricultural implements, and a large quantity of corn, cottonseed and other agricultural products, sufficient for the cultivation of said plantation, and other personal property, such as is usually found on a plantation of that size. This allegation is addressed to the executor; what other defendant has any interest in it? All of the brothers and sisters, and all the other defendants, were then (1876) third persons as to those allegations relating to matters thirty-three years old. So as to the three thousand dollars insurance collected on the death of her husband mentioned as an inducement to what follows. This is also a subject of controversy with the executor alone. Both matters are disconnected with the interests of all other defendants. They had no knowledge of these things, nor could their interest be affected thereby. There were no written articles of co-partnership as to any of these matters.

Paragraph eleven of the bill:

(3) The issues tendered therein are subjects of dispute by the executor, representing the dead husband. That two thousand acres of Highland was in a high state of cultivation, and completely equipped as a cotton plantation, thoroughly ditched and drained, with improvements of residence, gin-house, mill, barns, stables, tenant houses, cotton houses, fences, etc., is made a material allegation to be answered by the executor alone, since the other defendants know nothing of it and are not concerned about it now.

(4) The employment of B. L. Jones in April, 1877, for five hundred dollars and for 1878 for eight hundred dollars is a charge that all of defendants are not con-

nected with, yet it is forceful in view of the following charges to be answered by the representative executor alone. And so, as to the profitable crops of 1877 and 1878 the exact amount of the profits, it need be noted, is not stated. Then, how can all the defendants be called upon to join in answer to these important charges that lay the foundation for this case? This basis matter, as it is alleged in the bill, is immaterial with all, except, possibly, the executor, who "stands in the shoes" of him against whom they are aimed, the dead man.

(5) The bill then invites an investigation of the entire Highland plantation up to the marriage in December, 1878. Then the co-partnership and lease thereafter, to the death of Ben L. Jones in August, 1908.

(6) The fifth clause of paragraph 4 of the bill declares that the business on Highland plantation during all these years (thirty-three) resulted "in large income to the co-partnership, which said income is the foundation upon which has been built the great accumulation of property and money owned by said co-partnership to the death of said Ben L. Jones, and the source from which all the wealth of said partnership was derived." That, otherwise, Ben L. Jones was a financial pauper. The truth of these allegations are to be tested by the executor alone; in no sense are all of these defendants called upon to answer them.

(7) The sixth clause of paragraph 4 discloses the instability of the complaint in that, it calls all the defendants into court and there tells them, "it is impossible to set out in detail the multitude of transactions in which the said partnership was engaged, but the same will necessarily enter into the accounting." Now, then, take care of yourselves without further notice? Who can defend such indefinite charges?

This honorable court, we think, will quickly catch the idea that we cannot follow this bill, and its amendment, in even a reasonable synopsis, without much repetition

to the annoyance of the court. Yet, in duty bound, we ask the court to notice as it pursues the record that the complainant in the latter part of paragraph 4 lauds herself as having contributed "in a large measure to the phenomenal success and accumulations which resulted from the partnership operations and investments." Then she reiterates the pauperism of her plantation manager whom she condescended to marry after the two years of his extraordinary success in the control of her affairs. Then begins the most unusual assaults upon the most wonderful man this country has produced. In paragraph 5 of the complaint the unusual attack is made upon her husband's father along with him, for having purchased eighty acres of land from Pillow for one thousand eight hundred and thirty dollars in 1878, of which purchase one thousand, one hundred forty-six dollars and eighty-five cents was paid in cash and two notes given for three hundred forty-one dollars and fifty-seven cents each, which she alleges was paid by her money turned over to her manager after she married him, and she wants an accounting. What interest have any of the other defendants in this old transaction? It is remarkable, we most respectfully submit, that after more than thirty years she attempts to fasten a resulting trust upon this land. She accounts nothing for her husband's "brain and brawn."

We think it not improper to speak to this honorable court as apology for the length of this synopsis of the amended bill of complaint on the most important subject of its multifariousness, and especially to call the attention of the court to the general and universal charge in mere statement, "paid out of the partnership funds." Of the "multitude of transactions with which said partnership was engaged and in which said partnership was interested during the entire period above mentioned," it occurs to us as being folly to ask this court to hold all the defendants to joint and common defense. Our sin-

cere hope is based upon legal truth, as we see it, that the bill will be dismissed in toto and a proper administration allowed with any possible equity between husband and wife, or between them, or either of them, and others, properly asserted and determined what parties who may join issue upon any proposition. Our strongest argument must be in invoking the judgment of this honorable court as to whether it be possible for one bill to be free from the severest condemnation of duplicity that covers thirty years and hundreds of different kinds of large transactions with as many individuals and corporations.

Counsel's brief and argument in the court below, as it will doubtless be here, was to the effect that where all defendants have a common interest in the general subject-matter, the bill cannot be multifarious. This may be true as an abstract proposition, but the statement is wholly inapplicable here.

The authorities are agreed that no specific rule may be given by which to accurately determine when a bill is "multifarious" or may be held to prevent a "multiplicity of suits." We repeat that this case "speaks for itself." 64 Miss. 258 (257) 1886; 66 Miss. 587 (1889); 58 Miss. 838; Code 1906, sec. 598.

So, then, on the subject of our first assignment of demurrers, multifariousness, our evidence lies in the complaint as amended and upon the law arising from these plain facts, and in the sound judgment of the lawyers on the bench.

Gwin & Mounger and Tim E. Cooper, for appellee.

In *Butler v. Spann*, 27 Miss. 234, it is said that it is impossible to lay down any rule as to what constitutes multifariousness, that the application of the rule is held to depend upon the particular circumstances of each case. but when the parties have one common interest touching the matter of the bill, although they claim under distinct

titles, and have independent interests, the bill is not multifarious.

In *Garrett v. Mississippi & Alabama Railroad Co.*, Freeman's Chancery Rep. 70, it is said that complainant cannot demand by one bill several matters of different natures against several defendants, yet when one general right is claimed, although defendants have separate and distinct rights, a demurrer will not hold.

In *Wright v. Sheldon*, S. & M. Chancery, 399, it is held that, "It is not necessary that privity exist between each of two defendants provided privity exists between each of the defendants separately and the other defendants upon whom the gravamen of the bill rests. Where there is one general claim and the defendants have a common interest in the point litigated, they are properly united, though their rights as to the subject matter of the suit be separate."

In *Waller v. Shannon*, 53 Miss. 500, it is said that, "It is not indispensable that all parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some matters in the suit and they are connected with the others," citing Story Equity Pleading, sec. 271 A.

While it is frequently said by the court that it is impossible to lay down any rule for defining multifariousness, yet the decisions are unanimous in supporting the rule thus laid down.

This rule is illustrated and established in the following decisions of our court: *Garrett v. Miss. & Ala. R. R. Co.*, Freeman's Chancery Rep. 70; *Martin v. Pleasants*, S. & M. Chancery Rep. 17; *Wright v. Sheldon*, S. & M. Chancery Rep. 399; *Nevitt v. Gillespie*, 1 How. (Miss.) 108; *Delafield v. Anderson*, 7 S. & M., 630; *Butler v. Spann*, 27 Miss. 234; *Snodgrass v. Andrews*, 30 Miss. 472; *Forniquet v. Forstall*, 34 Miss. 96; *Thomas v. Thomas*, 45 Miss. 263; *McGowan v. McGowan*, 48 Miss. 453; *Jones v. Foster*, 50 Miss. 52; *Waller v. Shannon*, 53

Miss. 500; *Taylor v. Smith*, 54 Miss. 84; *Bishop v. Rosenbaum*, 58 Miss. 84; *State v. Brown*, 58 Miss. 835; *Barry v. Barry*, 64 Miss. 712; *Hardie v. Bulger*, 66 Miss. 577; *Ga. Pac. Ry. Co. v. Brooks*, 66 Miss. 583; *Henry v. Henderson*, 79 Miss. 454; *Moseley v. Larson*, 86 Miss. 288; *Thames v. Mangum*, 87 Miss. 575.

All of the decisions holding bills multifarious are but further illustrations of this rule. In no case has the bill been held multifarious where there was one general claim or where the defendants had a common interest in the point litigated, but where such was not the case the bill was held multifarious. *Columbus Ins. & Banking Co. v. Humphries*, 58 Miss. 258; *Robert v. Starke*, 47 Miss. 263; *Darcey v. Lake*, 46 Miss. 109.

Moreover, on the other hand, where there is "a common right or title" or "a community of interest in the subject-matter of controversy" not only will the bill be subject to the objection of multifariousness, but equity has jurisdiction on this ground alone, and will enjoin in order to prevent a multiplicity of suits. *Whitlock v. Yazoo, etc., R. R.*, 91 Miss. 779; *Railroad v. Garruson*, 81 Miss. 264; *Crawford v. Railroad*, 83 Miss. 708; *Tisdale v. Insurance Companies*, 84 Miss. 709; *Pollock v. Oklahoma Savings Bank*, 61 Miss. 293.

The bill of complaint charges, and the demurrer admits, the partnership; that all of the lands, all of the money, all of the corporate stock, the interests in the mercantile establishments, the interest in the ginneries, all of the bank stock fraudulently transferred on the books of the defendant banks, and all of the property sued for was the property, the assets, of the firm composed of the complainant and B. L. Jones; that it was all purchased with partnership funds, for the partnership account, in a partnership name, and held and owned by the partnership. There is therefore "a community of interest in the subject-matter of the controversy;" there is "a common interest touching the matter of the

bill;" "a general right claimed;" to wit, the winding up and settlement of this partnership. There is not a single defendant who is not interested in this settlement. The interest of no defendant in any part of this property can be determined without a settlement of the partnership. It is admitted that the complainant is interested as a co-partner of B. L. Jones in all of this property and her interest cannot be determined without such settlement of the partnership. As is said in *Moseley v. Larson*, 86 Miss. 288, "The several matters litigated are so related to one common subject (*i. e.*, the settlement of the partnership) that one cannot be well determined without the other." The settlement of the partnership is essential and a prerequisite to the determination of the rights and interests of every party to the suit named in the bill.

We therefore respectfully submit that there is no merit in the first or second objection to the bill for multifariousness.

SMITH, J., delivered the opinion of the court.

The bill of complaint is not open to objection on the ground of multifariousness. Among our numerous decisions dealing with this subject, we will refer specially only to *Butler v. Spann*, 27 Miss. 234; *Garrett v. Railroad Co.*, Freem. Ch., 70; *Wright v. Shelton*, Smedes & M. Ch., 399; *Waller v. Shannon*, 53 Miss. 500.

Since, under our statute (section 2517 of the present Code), all of the disabilities of coverture have been removed, a married woman may lawfully enter into a partnership with her husband. We can add nothing to what was said on this subject by this court in *Toof v. Brewer*, 3 South. 571. In that case the court was dealing with a partnership existing between husband and wife in the state of Arkansas; consequently the case has not been officially reported. We now direct that same be officially reported. See, also, *Hoaglin v. Henderson*, 119 Iowa,

720, 94 N. W. 247, 61 L. R. A. 756, 97 Am. St. Rep. 335; *Suau v. Caffé*, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593; *Burney v. Savannah Gro. Co.*, 98 Ga. 711, 25 S. E. 915, 58 Am. St. Rep. 342; *Ellis v. Mills*, 99 Ga. 490, 27 S. E. 640; *Vizard v. Moody*, 119 Ga. 918, 47 S. E. 348; *Morrison v. Dickey*, 122 Ga. 353, 50 S. E. 175, 69 L. R. A. 87; *Belser v. Tuscumbia Banking Co.*, 105 Ala. 514, 17 South. 40; *Schlapback v. Long*, 90 Ala. 525, 8 South. 113; *Lane v. Bishop*, 65 Vt. 575, 27 Atl. 499; *Bernard & L. Mfg. Co. v. Packard*, 64 Fed. 309, 12 C. C. A. 123; *In re Kinkead*, 3 Biss. 405, Fed. Cas. No. 7824.

We have not considered the fifth and sixth grounds of demurrer, for the reason that same do not go to the whole bill, and consequently can have no place in a general demurrer.

There is no merit in the other matter complained of.

Affirmed and remanded.

MASONIC BENEFIT ASSOCIATION OF STRINGER GRAND LODGE
v. FIRST STATE BANK OF COLUMBUS.

[55 South. 408.]

1. LIMITATION OF ACTIONS. *Demand deposits. Waiver. Concealment of cause of action. Code 1906, sections 3097 and 3099. Estoppel.*

A depositor in a bank cannot sue the bank for his funds so deposited until payment has been demanded and refused and such demand and refusal is necessary to set the statute of limitations in motion.

2. SAME.

The demand of the depositor, however, may be waived by the bank. This may be done by the bank notifying the depositor that his claim will not be paid; and rendering him a statement of his account, showing the balance claimed by the bank to be due him is equivalent to notice that any claim for a sum in excess of that

amount will not be paid and as to such excess the statute would begin to run from the time of the rendition of such statement.

3. CODE 1906, Section 3109. *Fraudulent concealment.*

Where a bank believing a forged endorsement to be genuine, paid a check to a person other than the drawer and delivered the cancelled check to the drawer as a voucher, Code 1906, section 3109, providing that "the fraudulent concealment of a right of action will postpone the running of the statute of limitations," has no application, as there was no fraud or concealment on the part of the bank, and the statute of limitations commenced running from the time the bank rendered the drawer a statement of its account showing the check charged against it.

4. *SAME.*

In such a case, the six years' statute of limitations applies as provided by Code 1906, section 3097, and not the three years statute of limitation as provided by section 3099 of Code 1906, as the pass book, cancelled check and certificate of deposit are written evidence of the debt.

5. ESTOPPEL IN PAIS. *Payment of forged paper.*

Where a bank pays a check drawn by a depositor to the wrong person, the endorsement having been forged and afterwards renders an account to the depositor in which the payment of such check is shown and the depositor receives the same without objection, he is not estopped from suing the bank, as estoppel in *pais* only operates in favor of one who, induced by the acts or representations of another, so changes his position that injury would result if the truth were known.

6. *SAME.*

Where the depositor neither by act nor representation, induced the bank to pay out money on a forged indorsement, the depositor is entitled to assume that his check, payable to order, will not be paid by the bank until it shall have assured itself that the necessary endorsement appearing thereon is genuine.

APPEAL from the circuit court of Lowndes county.

HON. JOHN L. BUCKLEY, Judge.

Suit by the Masonic Benefit Association of Stringer Grand Lodge against the First State Bank of Columbus. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

George B. Power and L. J. Winston, for appellant.

The first proposition presented for consideration is plaintiff's demurrer to defendant's first plea which is the same proposition presented by defendant's demurrer to plaintiff's replication—and that is within what limitation does the action fall.

We contend that it comes within the six year statute—and the suit was filed within six years from the date of the payment of the check in question.

Certainly the contract between plaintiff and defendant, out of a breach of which the suit grew was one in writing; it was evidenced by the deposit tickets, the bank pass books given to and received from the defendant and the further fact that the claim is based upon the payment of a check which must have, of necessity, been in writing, and the charging of said check improperly to the account of plaintiff, thereby reducing improperly the balance due by defendant to plaintiff on account of its deposits, etc.

"In some jurisdictions an action by a depositor for the balance of his account, as evidenced by his bank pass book, is an action upon an evidence of indebtedness in writing, within the meaning of the statute of limitations, and barred within the period prescribed for such actions. On the other hand, however, it has been held that there is no limitation to an action against a bank to recover money deposited therein." 25 Cyc. of Law, pp. 1041, 1047.

Under the amended declaration, this is clearly an action by the plaintiff to recover the balance of its account, which account was not closed until November 14, 1904.

"Such a suit may be brought within ten years from the time the right of action accrued, where the debt is evidenced by a bank pass book or certificate of deposit, since these are written instruments on which an action

at law may be brought within ten years." *Palmer v. Woods*, 35 N. E. 1122.

Another view that would bring this case within the six year statute, is that all the circumstances make the transactions between the parties an account stated, acquiesced in by the plaintiff through a mistake and through ignorance of certain facts which it was not in a position to discover at the time of its acquiescence; as the plaintiff was not presumed to know, and as it does not appear that it in fact knew the signature of the payee, it cannot be said that plaintiff was guilty of negligence in not discovering upon receiving its pass book the fact that the payee's name had been forged or improperly endorsed upon the check; it was the duty of the defendant to ascertain the genuineness of the endorsement and the plaintiff had a right to rely, in the absence of any circumstances arousing its suspicions, upon the faithful performance of its duty in that respect by the bank.

The second proposition is that, even if the action were one that came within the bar of the three year statute, the statute did not begin to run against the plaintiff until the filing of the suit against the plaintiff by the original payee of the check as that was the first information plaintiff had or could have had putting it on notice or inquiry regarding the endorsement on the check.

While the general rule is that the plaintiff's ignorance of the wrong committed or of his rights with respect thereto cannot be considered in determining when the statute begins to run a plain exception is made where the ignorance of the plaintiff is due to no fault or negligence of his own but to the peculiar circumstances of the case.

Certainly the facts set forth in the pleadings in the case at bar are amply sufficient to bring it well within the exception; the plaintiff unacquainted with the payee and therefore unacquainted with the payee's signature or handwriting, had absolutely no means of determining

the genuineness of the endorsement; according to law and to the custom prevailing in business circles, plaintiff had a perfect right to leave the defendant the obligation of passing upon the genuineness of the endorsement; that is one of the obligations that banks assume; that is one of the duties they undertake; plaintiff did not discover and had no means of discovering the improper endorsement, had no suspicion that the endorsement was improper and there were no facts or circumstances to put the plaintiff on inquiry until the filing of the suit by the original payee; plaintiff began this cause of action within three years from the filing of said suit and within three years from the time when plaintiff with all due diligence required of it could have learned of the improper endorsement and the improper payment of the check in question and the consequent improper charging of the amount thereof to plaintiff's account, thereby reducing plaintiff's balance.

"While no rule can be laid down that will cover every transaction between a bank and its depositor it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties and the established or known usages of banking business."

Certainly, in this case, plaintiff exercised all the diligence required by the circumstances, the relations of the parties and usages, etc.

The third proposition is that the plaintiff is barred by an estoppel *in pais* in that plaintiff failed or neglected to bring suit or institute any demand for the amount until such lapse of time as will preclude the defendant from making full proof of the actual untruthfulness of plaintiff's contention or from protecting itself against loss.

In the first place our court does not recognize the doctrine of laches short of the statutory bar.

Estoppel *in pais* only arises when manifest justice and equity as respects the rights of another require its application. *Madden v. Ry. Co.*, 66 Miss. 258.

The manifest justice and equity in the case at bar are with the appellant; it is the party who has suffered a wrong through no fault of its own.

Estoppel *in pais* operates only in favor of one who, induced by the acts or representations of another so changes his situation that injury would result if the truth were known. *Hart v. Foundry & M. Co.*, 72 Miss. 809.

No acts or representations of the appellant induced the appellee to so change its situation as to sustain injury.

The appellee in improperly paying the check in question and in improperly charging the amount to appellant committed the first fault and thereby occasioned the loss sustained by plaintiff and the appellee having committed the first fault certainly owed a duty to appellant to discover the improper endorsement and having failed in that duty it cannot visit the consequences upon the appellant, an innocent depositor, who performed its full duty to the appellee and used all due diligence required of it; we submit that appellee is hardly in a position to envoke the doctrine of estoppel *in pais*, for, if the appellee had performed its full duty, appellant would have been able to protect itself against a second payment of the check in question; the only duty owing from appellant was to act with that ordinary diligence and care that prudent men generally bestow on such cases, in the examination of pass books, returned vouchers, etc., to detect any errors or mistakes; more than this, under the circumstances of this case, could not have been required. It has never been held that the examination by the depositor of his account must be so close and thorough as to exclude the possibility of any error being overlooked by him.

The court will observe that it is shown by the pleadings that appellant had no knowledge of the fact that the payee's name had been improperly endorsed until the suit was filed against it—very nearly four years after appellant had every reason to believe and, as a matter of fact, did believe that all the matters between it and the original payee had been fully settled; the plaintiff had settled it in the way that it had settled many others before and in the way that it settled many others afterwards, with checks drawn upon the defendant bank.

It was contended in the lower court and will probably be argued in this court that the bank acted in "perfect good faith" in this transaction and that its good faith should be its exemption.

"And the latter (the bank) cannot avoid liability for having paid out money on a forged endorsement by showing that it acted in good faith." Morse on Banks and Banking (4 Ed.), vol. 2, p. 847.

Besides, there was equally as much good faith on the part of the plaintiff and the first fault was committed by the defendant.

We assume, of course, that it is not necessary to cite authorities to this court on the general proposition that a bank is liable to a depositor where it pays out money on the check of a depositor where the signature of the payee has been forged; the principle is so generally recognized as to need no citation of special authorities.

"Money paid on a forged endorsement may be recovered at any time that the forgery is discovered." Morse on Banks & Banking (4 Ed.), vol. 2, p. 847.

"Even where the last endorsement is genuine, the bank is not relieved from the duty of looking to the genuineness or prior endorsements." *Ib.*, p. 849.

The bank had every facility for informing itself as to the genuineness of the endorsement; it had the right to trace its genuineness back through all of the banks that had handled it; in fact, there was no obligation on the

part of the defendant bank to pay the check until it was satisfied that the endorsement of the payee's name was genuine; it owed a duty to the plaintiff to ascertain that fact; indeed, the facilities of the defendant for avoiding the payment of the check were greater than those of the plaintiff, for the plaintiff did not even know when the check came in; all of that was entrusted to the bank, in accordance with business custom and the plaintiff had a right to rely upon the bank to protect it in the payment of its checks.

"Whenever a check is made payable to order, the bank has an unquestionable right to assure itself of the genuineness of the order before making payment." *Ib.*, p. 851.

Suppose when the check reached the defendant bank after having come back through the several banks that handled it and the defendant had called up the plaintiff and said: "We have your check for four hundred and twenty-five dollars in favor of Hannah Roberson, but we are a little doubtful about the genuineness of the endorsement," what would have been the probable and the very proper reply of the plaintiff? "Before you pay the check, you had better inform yourself and satisfy yourself; we know nothing more about the endorsement than you do; you have the facilities of ascertaining whether or not it is genuine and we have not; you can trace it back through your several correspondents. It is your business to know that the endorsement is genuine." That is what all of us say to the banks that handle our accounts; we feel absolutely secure in the protection afforded us; we do not feel we are called upon to be constantly looking out for forged endorsements on the checks that we send out and it is not reasonable that we should have to stand the loss if the bank we do business with should let one of our checks be paid on a forged endorsement, and then seek to charge the amount to our account.

"Now as to a forged endorsement, the bank cannot charge such a check against the depositor, if it pays it, and the situation is different as to the duty of the depositor. While he is under the duty of examining returned vouchers, he is not expected to discover forged endorsements." Zane on Banks & Banking, p. 266.

If the loss can be traced to the fault or negligence of either party, it shall be fixed upon him only who is at fault generally it is that where no fault or negligence is imputable the loss has been suffered to remain where the course of business has placed it. *Gloucester Bank v. Salem Bank*, 17 Mass. 42.

Certainly, in the case at bar, it is not difficult to trace the loss to the fault and negligence of the defendant bank and certainly, the loss should be fixed upon it and it should be made to bear it.

"Where a deposit of money is made in bank, the statute of limitations does not begin to run until after demand is made." Morse on Banks & Banking, vol. 1, p. 590.

In the case at bar, the demand was made unnecessary; the pass book had been balanced and the defendant claimed to have no funds of the plaintiff on hand.

We submit that the trial judge erred in overruling our demurrers to defendant's pleas; they should have been sustained; that he erred in sustaining defendant's demurrer to our replications; it should have been overruled; the case should have gone to trial upon the case made out in the declaration and the plea of the general issue. The case should now be reversed and sent back for further hearing and disposition.

Wm. Baldwin, for appellee.

The relation of a bank to its depositor while not that of a trustee of his funds but only that of a debtor and creditor, yet has some characteristics that vary the relation from that of an ordinary debtor and creditor.

The early cases seem to hold that the statute of limitation applied to it as any other debt, but this was a holding so wrong, so monstrous indeed, that the courts quickly abandoned it.

It is amazing that any court should have ever held that because a depositor let a bank keep his money until it was barred by the statute of limitation, that would bar it, had it been an ordinary debt that the depositor was barred, yet some of the courts held it. That holding, however, is now universally condemned.

The modern doctrine is that the bank holds the deposit until called for by the depositor. That the bank is presumed to hold the deposit until called for, and this presumption lasts until the bank notifies the depositor that it no longer holds it subject to his checks. *Dickinson v. Savings Bank*, 152 Mass. 49.

When this notification is made to the depositor of the bank then it becomes the duty of the depositor to act within the time named by law for the assertion of his rights and see if the bank is correct.

When the bank has notified the depositor that it no longer holds his money, but has paid it out on his check, surely that is all it can possibly do and it then becomes the duty of the depositor to act within the time prescribed by law to see if the assertion of the bank is true and that it has paid out his money on his check. This is common honesty and common sense, and it is submitted that it is the law (see *Morse on Banking* (4 Ed.) p. 590-591).

What do we find to be the facts of this case: This suit was brought in November, 1908. One Littlejohn kept an account with this defendant bank, in the name of R. D. Littlejohn, Treasurer, and on November 11th, 1902, issued his check on this defendant bank for four hundred and twenty-five dollars, which was paid promptly on presentation.

On the first day of January, 1903, a little under six years before this suit was brought, the defendant bank returned to Littlejohn this check of his for four hundred and twenty-five dollars, marked paid, and gave to him a statement of his account, showing that the defendant bank no longer held this four hundred and twenty-five dollars for him, but had paid it out on his check.

That thereafter on the first days of February to October inclusive, this defendant bank gave each month its statement, showing in the balance presented by his account that the defendant bank had paid this check of four hundred and twenty-five dollars.

In October or November, 1903, five years before this suit was brought, Littlejohn dies, and never had this defendant bank one word from him that this check was wrongfully paid and this amount, four hundred and twenty-five dollars, wrongfully charged to his account.

Plaintiff then claims of defendant bank that the account standing in the name of R. D. Littlejohn, treasurer, was the funds of plaintiff, and calls for a statement of the amount due on that account.

On November 7th, 1903, five years before this suit was brought, the defendant bank gave to plaintiff a statement of the amount due on the account and plaintiff at once passed it to its account.

On November 14th, 1904, four years before this suit was brought, the plaintiff called for a statement of the amount due to plaintiff, and when the amount was furnished to plaintiff, it at once checked it out of defendant bank.

Each and every one of these statements always gave notice to all interested that the defendant bank no longer held that four hundred and twenty-five dollars, and yet it is claimed that the plaintiff had no notice of the fact that the four hundred and twenty-five dollars was charged against the fund, and that there was no duty

devolving upon plaintiff to see if the charge was wrongful.

It is submitted that the bare narration of the facts of this case, make the claim of plaintiff not only illegal, but that independent of the bar of the statute of three years, that it is so inequitable as not to be tolerated.

Counsel for appellant cites 25th Cyc. of Law, p. 1041, sec. 7, which reads as follows: "In some jurisdictions an action by a depositor for the balance of his account, as evidenced by his bank pass book, is an action upon the evidence of indebtedness in writing, within the meaning of the statute of limitations, and barred within the period prescribed for such actions. On the other hand, however, it has been held that there is no limitation to an action against a bank to recover money deposited therein."

It is submitted that counsel has failed to get the legal proposition here announced by the writer.

Its meaning (as admitted) is this, that had the plaintiff brought suit against the defendant bank for the amount shown to be due as evidenced by the pass book, or, as the author expresses it, "further balance of his account as evidenced by his bank pass book;" that in some jurisdictions, it would be held as an action upon an evidence of indebtedness in writing, etc.

This is entirely a different proposition from this suit. This suit is for the recovery of money, where the balance shown by the pass book shows that the money is not there.

And in the case of *Palmer v. Woods*, 35 N. E. 1122, relates to the same sort of case; that is, where the debt is evidenced by the pass book. The difference between the cases is this: In the case at bar, the pass book itself denies the debt, but shows in the balance brought forward that the bank has not got the depositor's money. This case, however, is upon a local statute.

Again counsel contends that the three years statute did not begin to run until appellant had learned that the payee of its check had not authorized its payment.

It is submitted that when the appellant learned from its pass book, that the bank had paid out four hundred and twenty-five dollars of its money on its check to Hannah Roberson, and had charged that amount against appellant's account, that this was all the notice that the bank could possibly give appellant, and that appellant ought within three years time to have discovered that the charge of four hundred and twenty-five dollars was wrongful and made its rights known in some way.

Counsel for appellant presents as a reason for the application of the six-year statute to this suit that it is upon account stated.

It is submitted that counsel is in error in this. This suit is not at all upon an account stated.

It may be conceded to be the law that the balancing of a bank book presents an account stated between the parties, the depositor and the bank.

That proposition of counsel might apply if the plaintiff was suing on the balance admitted to be due, for that is what a stated account means. But this suit presents no suit upon a stated account, but upon money expressly denied by the stated account.

And the three-year statute set up by the defendant bank reads that, "Actions on an open account, or stated account, not acknowledged in writing signed by the debtor, etc."

It is submitted that the balancing of the account in the depositor's bank book surely, most certainly, cannot be construed to be a stated account, acknowledged in writing and signed by the debtor as to money not admitted by the account to be due, but on the contrary shown to be not due.

ANDERSON, J., delivered the opinion of the court.

The appellant, the Masonic Benefit Association of Stringer Grand Lodge, sued appellee, the First Sate Bank of Columbus, in the circuit court of Lowndes county. There was a judgment in favor of appellee, from which appellant prosecutes this appeal.

The judgment appealed from was rendered alone on the pleadings. The declaration sets out these facts:

That one branch of the business of appellant is insuring the lives of its members; that the appellee is a banking corporation under the laws of this state, and engaged in business in the city of Columbus, Lowndes county. "That on the 11th day of November, 1902, and for some time prior thereto, plaintiff was a customer and depositor of and with the said defendant, and as such customer and depositor carried on deposit with the said defendant large sums of money, which said deposit was in the name of 'R. D. Littlejohn, Treasurer'; the said R. D. Littlejohn being a duly elected officer of said plaintiff, and as such having the custody and control of the funds of said plaintiff. That from time to time plaintiff, through the said R. D. Littlejohn, its treasurer and duly authorized agent, made deposit of its funds with the said defendant, and from time to time plaintiff, through the said R. D. Littlejohn, withdraw from the custody of said defendant certain of its funds by means of checks and drafts signed 'R. D. Littlejohn, Treasurer.' That on the said 11th day of November, 1902, plaintiff then being a customer and depositor of the said defendant, and having funds to its credit with the said defendant largely in excess of the sum of four hundred and twenty-five dollars issued through its treasurer and duly authorized officer and agent, the said R. D. Littlejohn, its check for the sum of four hundred and twenty-five dollars in favor of Mrs. Hannah Roberson, payee. The said check was in the usual form, and was drawn on the account of plaintiff with said defendant, and was drawn

in favor of the payee for the purpose of paying to her the amount therein named as a part of the proceeds of the benefit certificate held by her deceased husband. That plaintiff attaches hereto, as a part of this declaration, a copy of said check, together with all the memoranda, indorsements, and notations made thereon, and said copy being filed in lieu of the original, which plaintiff is unable to file herewith, as the same is beyond the control of plaintiff, being attached to and forming a part of the court files in the case of *Hannah Roberson v. Masonic Benefit Association*, in the circuit court of the Second District of Tallahatchie county, Mississippi. That on the 20th day of November, 1902, as is evidenced by notations appearing on said check, to wit, 'Paid 11—20—02,' the said defendant paid said check, and thereupon charged the account of plaintiff with the amount thereon, to wit, the sum of four hundred and twenty-five dollars. That while said check was payable to Mrs. Hannah Roberson, and to none other, and payable to Mrs. Hannah Roberson only upon proper indorsements, the same was paid by the said defendant to another person than the said Mrs. Hannah Roberson, and when it had not been indorsed by the said Mrs. Hannah Roberson, the payee, either by herself or by any one else authorized by her so to do, and that the placing of her name on said check as an indorsement thereof was wholly unauthorized. That it was the duty of the said defendant, the First State Bank of Columbus, Mississippi, before paying the aforesaid check to ascertain the validity and genuineness of the indorsements appearing thereon, and that said defendant owed to this plaintiff the duty, obligation, and responsibility of ascertaining and knowing that the purported indorsement of said check by the said Mrs. Hannah Roberson was valid and genuine, and that, in its failure so to do, defendant paid said check at its peril. That on the 28th day of May, 1906, Hannah Roberson filed suit against this plaintiff to recover the

amount claimed by her to be due from this plaintiff to her on account of the aforesaid benefit certificate held by her husband, to satisfy a part of which amount so claimed to be due the aforesaid check was drawn on the defendant in favor of said Hannah Roberson. That on the trial of said cause it developed, and for the first time came to the knowledge of this plaintiff, that the signature and purported indorsement by the said Hannah Roberson was not her act. That said check had not in fact been indorsed by the said Hannah Roberson herself, or by any one authorized by her so to do. That the trial of said cause resulted in a judgment in favor of the said Hannah Roberson and against the said defendant for the sum of four hundred and twenty-five dollars, together with interest amounting to one hundred and six dollars and eleven cents, which said judgment was entered on January 9, 1907, in the circuit court of the Second District of Tallahatchie county, Mississippi. That plaintiff appealed from said judgment to the supreme court of the state of Mississippi, and said court, on April 27, 1908, affirmed the judgment of the lower court, and thereupon plaintiff, being compelled so to do, paid and satisfied the said judgment, together with all interest, damages, and costs. That, by reason of the negligent and wrongful act of the said defendant, First State Bank of Columbus, Mississippi, in failing to ascertain the validity and genuineness of the purported indorsement of said check, and by reason of the wrongful act of said defendant in paying the said check to some one other than the payee therein named, when the said check had not been properly indorsed by the payee therein named, and when in fact it had not been indorsed at all by the said payee, the purported indorsement being unauthorized, which it was the duty of the defendant to have discovered, and by reason of the wrongful action of the said defendant in charging to plaintiff's account the sum of four hundred and twenty-five dollars so paid

out by the said defendant, and in the payment of which said defendant wrongfully applied so much of the funds of plaintiff then on deposit with defendant to the credit of plaintiff, the said defendant, then and there owing to the said plaintiff certain obligations, duties, and responsibilities imposed by law and most wrongfully violated by defendant, was liable to plaintiff in the sum of four hundred and twenty-five dollars."

By leave of the court the declaration was amended as follows:

"That by reason of the negligent and wrongful act of said defendant, the First State Bank of Columbus, Mississippi, in failing to ascertain the validity and genuineness of the purported indorsement of said check, and by reason of the wrongful act of the said defendant in paying the said check to some one other than the payee therein named, when the said check had not been properly indorsed by the payee therein named, and when, in fact, it had not been indorsed at all by the said payee, the purported indorsement being unauthorized, which it was the duty of the defendant to have discovered, and by reason of the wrongful action of the said defendant in charging to plaintiff's account the sum of four hundred and twenty-five dollars so paid out by the said defendant, and in the payment of which said defendant wrongfully applied so much of the funds of plaintiff then on deposit with defendant to the credit of plaintiff, the said defendant, then and there owing to the said plaintiff certain obligations, duties, and responsibilities imposed by law and most wrongfully violated by defendant, was liable to plaintiff in the sum of four hundred and twenty-five dollars, and has ever since continued liable to the said plaintiff in the sum of four hundred and twenty-five dollars on account of the said deposits made by the plaintiff with defendant as hereinbefore set forth, which said sum was and is the balance due by defendant to plaintiff, and never has been checked against by plaintiff in the

hands of said defendant, or otherwise withdrawn by plaintiff from the custody of the defendant."

The appellee pleaded to this declaration the general issue, with notice thereunder, and in addition three special pleas. The first special plea sets up the bar of the statute of limitations of three years; the second, "*estoppel in pais*;" and the third amounts merely to the general issue. The special matter of which notice is given under the general issue is as follows:

"And the said defendant, the First State Bank of Columbus, Mississippi, here gives notice to the said plaintiff that upon the trial of this cause it will offer proof to the effect following, to wit: That on or many years prior to the date of said check, to wit, November 11, 1902, one R. D. Littlejohn, now deceased, had kept an account with the defendant bank in the name of 'R. D. Littlejohn, Treasurer.' That upon the 20th day of November, 1902, there was presented to the defendant bank a check for the sum of four hundred and twenty-five dollars, payable to the said Hannah Roberson, and signed, 'R. D. Littlejohn, Treasurer.' That said check was duly indorsed, having the name of Mrs. Hannah Roberson written on the back thereof. The defendant bank promptly paid the check, as was its duty, and charged the amount thereof to the account of R. D. Littlejohn, Treasurer. That thereafter, on the 1st day of January, 1903, this defendant, upon the application of the said R. D. Littlejohn, treasurer of plaintiff, to furnish him with a statement of his balance in defendant's bank, did furnish to the said R. D. Littlejohn its statement as to the balance there on January 1, 1903, to his credit in defendant's bank, and that said statement so rendered on January 1, 1903, to the said R. D. Littlejohn, treasurer, showed plainly upon its face that this check had been paid as aforesaid, and the amount thereof, to wit, four hundred and twenty-five dollars, duly charged against said account. That thereafter, on the

1st days of February, March, April, May, June, July, August, September, and October of the year 1903, this defendant bank gave on each of these days, being nine times, a statement of his account with the said defendant bank, each and every statement showing in the balance brought forward the payment of said sum of four hundred and twenty-five dollars upon said check, and that this defendant bank had charged against said account the amount of said check, to wit, four hundred and twenty-five dollars. That in the month of October or November, 1903, the said R. D. Littlejohn died, and plaintiff, the Masonic Benefit Association, called upon defendant bank, stating that plaintiff was the owner of said account then standing in the name of R. D. Littlejohn, treasurer, and called upon defendant bank for a statement of the amount thereof. That on November 7, 1903, this defendant bank gave to said Masonic Benefit Association a statement of the account of R. D. Littlejohn, treasurer, in which said statement appeared, in the balance so presented, the payment of this check of four hundred and twenty-five dollars made to Hannah Roberson. That thus was the account of R. D. Littlejohn closed on the 7th day of November, 1903, when the said plaintiff took the said account and transferred it to its account with this defendant, and thereafter kept an account with this defendant bank in its own name until the 14th day of November, 1904. That on that day, November 14, 1904, said plaintiff, the Masonic Benefit Association, called for a statement as to what was due it by this defendant bank, and was on that date, November 14, 1904, furnished by this defendant with the amount that this defendant bank owed plaintiff. That on said date, November 14, 1904, the said plaintiff, the Masonic Benefit Association, drew out of this defendant bank all of said amount of said account so furnished it on its demand on that day as aforesaid, and has since

that time, to wit, November 14, 1904, had no deposit with this defendant."

Appellant replied to appellee's special pleas as follows:

"Replication to First Plea. It is not true that the claim of said plaintiff against the said defendant is barred by section 3099 of the Code of Mississippi, because plaintiff says that the said claim is one based upon the contract in writing, evidenced by the deposit slip and the bank pass book given to and received from the said defendant, constituting the contract between plaintiff and defendant and the liability of defendant to plaintiff, and the further fact that the claim is based upon the payment by the defendant of a check which must have, of necessity, been in writing, and the charging of said check improperly to the account of said plaintiff with said defendant, thereby reducing improperly the balance due by defendant to plaintiff on account of said deposits, which said balance has never been checked against by plaintiff in the hands of the said defendant, or otherwise withdrawn by the plaintiff from the custody of said defendant.

"Second Replication to First Plea. It is not true that the claim of the plaintiff against the said defendant is barred by section 3099 of the Code of Mississippi, because plaintiff says that the action was commenced within three years from the time when plaintiff first learned of the improper payment by the said defendant of the said check, and of the improper charging of the said check to the account of the said plaintiff, thereby reducing the balance to plaintiff's credit with the said defendant, and that the said suit was brought within three years from the time when plaintiff, with all due diligence required of it, could have learned of said improper payment, of the consequent improper charging of the amount thereof, and because plaintiff says that no limitation began to run against it and in favor of the

said defendant until the discovery by the said plaintiff of the said improper payment and the consequent improper charge, or until it could with due diligence have learned of the said improper payment and the consequent improper charge.

“Replication to Second Plea. It is not true that plaintiff is barred by an estoppel *in pais* from bringing this suit, in that plaintiff failed and neglected to bring suit or institute any demand for said sum until such lapse of time as will preclude the defendant from making full proof of the actual untruthfulness of plaintiff's contention, or from protecting itself against loss, because it says that the defendant, in improperly paying the aforesaid check and in improperly charging the said check to this plaintiff, committed the first fault, and that such action on the part of the defendant is the cause of the loss sustained by the plaintiff, upon which the said suit is founded, and that the defendant, having committed the first fault, owed a duty to plaintiff to discover the improper indorsement of the aforesaid check, and, having failed in its duty, it cannot visit the consequences upon this plaintiff, an innocent depositor, who performed its full duty to the defendant and used all due diligence required of it, and because this plaintiff says that, if the said defendant had performed its duty to plaintiff, plaintiff would have been enabled to protect itself against a second payment of the aforesaid check and against the loss sustained thereby, on which said loss this suit is founded.”

The replication to the third special plea is a mere denial of it.

To appellant's replication to appellee's first and second special pleas a demurrer was sustained, and, appellant declining to plead over, final judgment was entered dismissing the suit.

The check in question was drawn November 11, 1902, and paid by appellee November 20, 1902, and the first

bank statement showing payment of the check was made January 1, 1903. This suit was brought November 13, 1908; therefore within six years from the time of the payment of the check, but more than three years thereafter.

The questions presented for decision, which will be considered in the order hereinafter set out, are: (1) When did the statute of limitation begin to run against appellant's claim? (2) What statute of limitation applies—that of three years, or of six years? (3) Whether appellant, even though not barred by any statute of limitation, is estopped to maintain this suit?

1. A depositor in a bank cannot sue the bank for his funds so deposited until payment has been demanded and refused. His right of action does not accrue until such demand and refusal; and such demand and refusal to pay is necessary, in order to set the statute of limitation in motion. The demand by the depositor, however, may be waived by the bank. This may be done by the bank notifying the depositor that his claim will not be paid; and rendering him a statement of his account, showing the balance claimed by the bank to be due him, is equivalent to notice that any claim for a sum in excess of that amount will not be paid, and as to such excess the statute would begin to run from the time of the rendition of such statement. 1 Morse on Banks and Banking (4 Ed.), pp. 590, 591.

The contention that the statute did not begin to run until the discovery by appellant of the forged indorsement of the check is unsound. Section 3109, Code of 1906, has no application to this case. It provides: "If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered."

There was no fraud perpetrated or concealed on the part of appellee. It paid the check in good faith, believing the indorsement genuine. Neither the appellant nor the appellee were at fault in failing to discover the forged indorsement after the payment of the check. Appellee's failure to discover the forgery at the time it was presented, resulting in its payment, made it liable to the party defrauded to the amount of the check; but after that the duty rested equally on appellant and appellee to discover the forgery, and appellant's opportunities for making the discovery were as good as appellee's, because appellant had in its possession the canceled check with the forged indorsement, which had been rendered to it as a voucher. The running of the statute was, therefore, not delayed to the time of the discovery by appellant of the forged indorsement. Our judgment is appellant's right of action accrued, and therefore the statute of limitation was set in motion against it, on January 1, 1903, on which date appellee rendered to appellant a statement of its account, showing this item of four hundred and twenty-five dollars charged against it. This suit was instituted November 13, 1908, within six years of the rendition of said account, and therefore, if the six-year statute applies, this cause is not barred.

2. Section 3099, Code of 1906, provides: "Actions on an open account or stated account not acknowledged in writing; signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of the action accrued, and not after." And section 3097, Code of 1906, provides: "All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after." It is contended for appellant that the claim, for which suit is brought, does not rest in parol, but is a claim provable by writing, and therefore that the statute of limitation of six years applies, and not that of

three years; that the writing by which the claim is provable is appellant's bank pass book, its certificates of deposit, and the canceled check for four hundred and twenty-five dollars wrongfully paid by appellee on the forged indorsement.

Washington v. Soria, 73 Miss. 665, 19 South. 485, 55 Am. St. Rep. 555, was a suit by the vendor against the vendee for the unpaid purchase money of the land conveyed, based alone on the recitals in the deed of the deferred purchase-money payments; the deed being signed alone by the vendor, the vendee having signed no writing agreeing to make the payments. The vendee plead the statute of limitation of three years and of six years. On this question the court said: "We are of the opinion that the six and not the three-years statute applies. The action is not upon a contract provable by parol, but is one provable by a writing. Whether the action which might have been brought at law could have been on the promise contained in the deed, treating it as the deed of the defendant because of his acceptance, and the estoppel operating upon him to deny it to contain his written contract, as the decided weight of authority holds may be done, or whether, as is held by the Massachusetts courts, no action could have been maintained on the deed, but the plaintiff must have sued upon the promise implied by law from the acceptance of the deed by the defendant, is, we think, immaterial. In either event, the promise of the defendant, whether it be express or implied, is to perform a contract, the terms of which are written, and not unwritten. The promise to pay is implied by law, but it is a promise to perform a written and not an unwritten contract."

To the same effect is *Fowlkes v. Lee*, 84 Miss. 509, 36 South. 1036, 68 L. R. A. 925, where the court held that a recital of the consideration in a deed which had not been paid was a promise in writing by the grantee to pay the consideration, and therefore

a promise provable by writing, and barred by the statute of six years, and not that of three years. In the opinion in that case the court cites, to sustain its position, *Jassoy v. Horn*, 64 Ill. 379, which was an action of assumpsit, and the evidence of indebtedness relied on by the plaintiff was a deposit bank book, kept in the usual form. The bar of the five year statute, covering unwritten contracts, was pleaded. It was held that the account, evidenced by the bank book, was not barred until the lapse of sixteen years, the period of limitation covering written contracts. The court said: "The entries in the book were made by the bankers, and they charged themselves with the money deposited. They constituted 'evidence of indebtedness in writing' within the meaning of the statute." This holding was approved by the subsequent case of *Schalucky v. Field*, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399.

Cock v. Abernathy, 77 Miss. 872, reported in 28 South. 18, where the facts are more fully set out than in the official report, was a suit by a principal against the estate of his attorney in fact for money collected by the latter for his principal, which he had failed to turn over in his lifetime. The only written evidence of the claim was a receipt for the money given by the attorney in fact to the party from whom it was collected. More than three years, but less than six had intervened between the date of this receipt and the suit. The court said: "The claim was not barred by the statute of limitation of three years, because the liability of Roberson (the attorney in fact) is provable by a writing"—citing *Washington v. Soria*, *supra*; the writing referred to being the receipt given by the attorney in fact.

In 25 Cyc. 1041, the principle is stated thus: "In some jurisdictions an action by a depositor for the balance of his account, as evidenced by his bank pass book, is an action upon an evidence of indebtedness in writing,

within the meaning of the statute of limitations, and barred within the period prescribed for such actions."

It is not necessary, as will be seen from the authorities above referred to, that the writing evidencing the contract be *signed* by the party sought to be charged. It is a contract in writing in the sense of the statute, if it is provable by writing; and it is not necessary that the writing itself shall contain an express promise to pay. It is sufficient if the promise to pay may be implied from the writing. In the case at bar, in order to raise the promise to pay by appellee, it is only necessary to resort to appellant's bank pass book and certificates of deposit, in connection with the canceled check in question, all of which are in writing. From the bank book and certificates there was an implied promise by appellee to return to appellant all funds deposited with it, not legally transferred by the latter by check or otherwise. We think clearly the statute of limitation of six years applies, and not that of three.

3. It is contended for appellee that appellant is estopped to maintain this suit, because of the fact that appellant made no objection to the numerous statements rendered it by appellee of its account, after the payment of the check in question, showing its charge against appellant. Estoppel *in pais* only operates in favor of one who, induced by the acts or representations of another, so changes his position that injury would result, if the truth were known. *Hart v. Foundry & M. Company*, 72 Miss. 809, 17 South. 769. There is no element of estoppel in this case. The appellant and appellee were equally ignorant of the forged indorsement of the check during the period these statements were being rendered. Appellant, neither by act nor representation, induced appellee to pay out the money on the forged indorsement. It is said in 2 Morse on Banks and Banking (4 Ed.) 846: "The depositor is entitled to assume that his check, payable to order, will not be paid by the bank

until it shall have assured itself that the necessary indorsements appearing thereon are genuine. Welsh's bookkeeper had charge of his bank books and of his produce. He made fictitious accounts of purchases, and got Welsh to sign checks for payment of the price, payable to the order of the customer from whom the alleged purchases were made. The bookkeeper forged the customer's indorsement and got the money. Welsh did not discover the fraud for some months, but gave prompt notice when he did. It was held that neither the deception upon him, nor his receiving the bank books and checks as vouchers, precluded him from recovering of the bank. The person whose name is forged is not obliged to examine immediately to detect the forgery. It is sufficient if he notifies the bank when he discovers the forgery."

Reversed and remanded.

TOWN OF PURVIS v. S. E. REES.

[55 South. 481.]

JUSTICE OF THE PEACE. *Petition for appeal. Certificate of justice of peace. Contradiction of certificate.*

Where a municipality filed a petition for appeal from a justice court and the justice certified at the bottom of such petition that the same had been filed and appeal granted as of a certain date, the justice will not be permitted to impeach his own certificate.

APPEAL from the circuit court of Lamar county.

HON. W. H. COOK, Judge.

Suit by S. E. Rees against the Town of Purvis. From a judgment in the circuit court. dismissing an appeal from the justice court, defendant appeals.

The facts are fully stated in the opinion of the court.

C. G. Mayson and McWillie & Thompson, for appellant.

It is true that the justice of the peace as a witness swore, over the objection by the town, present appellant, that he did not receive a petition for an appeal until November 16th, 1908. In respect to this we have to say that he was an incompetent witness to impeach his own official record and the objection was properly raised and improperly overruled. This is a matter which cannot be answered by claiming that the point at issue was whether the record was an official act, since there are two petitioners for appeal and the justice of the peace as a witness affirmatively admitted that he executed one of them. It is true he testified that he signed it on the 16th day of the month, but in this he must have been misled by assuming that he signed it on the date it was filed by the clerk of the circuit court. The petition shows on its face that he signed it on the 10th, and to allow him to dispute that date is to permit him to contradict his official act.

Frank Johnston and T. E. Salter, for appellee.

ANDERSON, J., delivered the opinion of the court.

The appellee, S. E. Rees, sued the appellant, the town of Purvis, in a court of a justice of the peace, and recovered judgment by default, from which the appellant appealed to the circuit court, where the appeal was dismissed, on the ground that it had not been taken within five days from the rendition of the judgment, from which judgment of dismissal the appellant prosecutes an appeal to this court.

Judgment was rendered by the justice of the peace on November 9, 1908. The appellant, for some reason not sufficiently explained, filed two petitions for appeal, either one of which is sufficient in substance and form. Both petitions are dated November 10, 1908, and pur-

port to have been signed by the justice of the peace who rendered the judgment. One of these petitions had at its conclusion this: "The foregoing petition received, filed, and granted by me this 10th day of November, 1908. [Signed] H. B. Freeman, J. P." And the other: "Petition filed and appeal granted this November 10th, 1908. [Signed] H. B. Freeman, J. P." On the motion in the circuit court to dismiss the appeal, the justice of the peace who rendered the judgment was introduced as a witness on behalf of the appellee, and testified that he did not sign one of these petitions; that his signature thereto had been forged. As to the other, he admitted that he signed it, but denied that he had signed it on November 10, 1908, the date it purported to have been signed, claiming that he signed it on November 16, 1908, more than five days after the rendition of the judgment in his court.

Section 94, Code of 1906, dispenses with the necessity of municipalities giving appeal bonds; and section 95, Code of 1906, provides that in all cases where an appeal is desired from a judgment of a justice of the peace by a party who is not required to give bond therefor, a written demand for an appeal shall be filed in lieu of the bond required by others, within the time allowed for appeals in such cases. The testimony, other than that of the justice of the peace, for the purpose of showing that neither of the petitions for appeal was filed within five days of the rendition of the judgment appealed from, was wholly insufficient; in fact, the testimony of the justice of the peace was all that really tended to establish that fact. In *Duncan v. Gerline*, 59 Miss. 550, a deputy sheriff was held to be incompetent to give testimony contradicting the return made by him on a writ; and in *Stone v. Montgomery*, 35 Miss. 83, it was held that an officer, taking and certifying an acknowledgment to a conveyance, was incompetent as a witness to impeach the statements of fact in his official certificate.

Just above the signature of the justice of the peace (the one admitted to be genuine) to the petition for appeal is the indorsement that the petition was filed and the appeal granted on November 10, 1908 (the next day after the judgment was rendered). The justice of the peace was incompetent to impeach this indorsement or certificate; and this is true, whether it was written by him or by some one else, provided, of course, if written by some one else, it had been done at the time he appended his signature. In other words, by attaching his name and office to the petition with this indorsement on it, he was precluded from falsifying such indorsement. It follows that the cause was properly in the circuit court by appeal.

Reversed and remanded.

JACK RODGERS *v.* CITY OF HATTIESBURG.

[55 South. 481.]

1. CRIMINAL LAW. *Appeal. Certification of record. Code 1906, sections 84 and 85. Supreme court jurisdiction.*

Under Code 1906, sections 84 and 85, on appeal to the circuit court the copy of the record of proceedings before a police justice must be certified to by the police justice and not the city clerk.

2. CIRCUIT COURT. *Supreme court. Want of jurisdiction.*

Where on appeal from a police justice court to the circuit court the record of proceedings before the police justice was not certified to by the police justice, the circuit court was without jurisdiction of the appeal, and on a further appeal to the supreme court that court was without jurisdiction of such appeal.

3. SAME.

The want of such a certified copy is not a defect which can be waived or cured. It is jurisdictional and the question may be raised for the first time in the supreme court.

4. SAME.

The proper order in the supreme court in such case is to reverse and remand the case with direction to the circuit court to dismiss the appeal to that court and award a writ of *procedendo* to the court of the police justice to enforce the judgment of his court unless the appellant shall perfect the record of proceeding from such police court.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

Jack Rodgers was convicted of violating an ordinance of the City of Hattiesburg and appeals.

The facts are fully stated in the opinion of the court.

Currie & Currie, for appellant.

This court has but one thing to do in this case and that is to declare the judgment appealed from null and void on the ground that the record of the police justice court is not certified in the manner required by section 86 of the Code of 1906. This requirement is jurisdictional and without it the circuit court is absolutely without authority to try the case. Section 86, Code 1906.

We cite the case of *McPhail v. Blann*, 47 So. Rep. 666, in which the court uses this language, "the proceedings in the justice's court are not certified in the manner provided by law."

We cite the case of *City of Greenwood v. Weaver*, 50 So. Rep. 981.

Jas. R. McDowell, assistant attorney-general, for appellee.

This case was tried in the circuit court on an appeal from the justice court. The bare record is before the court now. No stenographer's notes seem to have been preserved. Counsel relies for reversal on the fact that the city clerk, instead of the police justice, certified the record up to the circuit clerk and cites the *Weaver case*,

50 So. 981, that has since been affirmed; and the *Lula Allen case*, 53 So. 498.

The record in the instant case shows that timely objection was not interposed. Counsel had an opportunity to object to the record, but failed to do so. He went to trial, and after conviction, for the first time, in the supreme court, he raised the question. This same matter was thrashed out in two other cases recently decided by this court without written opinion. *Casper Vahle v. Gulfport*, 53 So. 586, and *Barreyt v. City of Hattiesburg*, 54 So. 317.

Our court has held, in the case of *Calhoun v. State*, 86 Miss., quoting from the syllabus:

"A defendant who has been tried and convicted of a misdemeanor in the circuit court, on his appeal from the judgment of justice of the peace, cannot complain of the absence of a duly certified copy of the proceedings of the justice of the peace, if there be on file in the circuit court the affidavit on which he was tried, a copy of the judgment of the justice of the peace convicting him, and his appeal bond."

Judge Houston, at the bottom of page 555 said:

"While, technically, the justice of the peace should have certified to his docket entries and judgment, still, it appearing from this record that a copy of said entries and judgment, as well as the affidavit, and appeal bond, was filed in the circuit clerk's office, and that no action was taken by defendant to perfect her own appeal, and no objection of any kind made to this record, either by her or the state, until after the defendant had taken the "chance of success by going to trial," we think it too late for defendant, after conviction, to raise this objection to the record, which under the circumstances, does not, in our opinion, go to the very essence of jurisdiction," citing *Coleman v. Gordon*, 16 So. 340.

The record in the instant case contains the judgment and the affidavit in the police court, which is sufficient

to rest a conviction upon. The appellant should have moved to strike the record from the file, because not certified to by the police justice. Not having done so, he waived all irregularities, and cannot now take advantage of them.

ANDERSON, J., delivered the opinion of the court.

The appellant, Rodgers, was convicted before the police justice of the city of Hattiesburg, under an ordinance of said city, of the unlawful sale of intoxicating liquors, and appealed to the circuit court, where he was again convicted and prosecutes an appeal to this court.

On the appeal to the circuit court, the copy of the record of proceedings before the police justice was certified to by the city clerk, and not by the police justice. Sections 84 and 85, Code of 1906, as construed in *City of Greenwood v. Weaver*, 50 South. 98, and *Allen v. State*, 53 South. 498, required this certificate to be made by the police justice.

There was no motion made in the court below by appellant, or other steps taken, to have the police justice to properly authenticate the record of proceedings in his court; nor was there any motion made by the appellee to dismiss the appeal, on the ground that the police justice had not certified to such record. It is contended by the appellant for the first time on this appeal, that, because of the absence of a properly authenticated record of the proceedings before the police justice, the circuit court was without jurisdiction, and therefore this court is without jurisdiction of this appeal, and it follows that the judgment of the court below must be reversed. While it is contended on behalf of the appellee that, by failing to make the objection in the court below, the appellant is precluded from making it in this court, and to sustain this position it relies on the case of *Calhoun v. State*, 86 Miss. 553, 38 South. 660, which so holds. In *Ruff v. Montgomery*, 83 Miss. 184, 35 South. 465; *Ball v. Sledge*,

82 Miss. 747, 35 South. 214; *Gardner v. Railroad Co.*, 78 Miss. 640, 29 South. 469; *McPhail v. Blann*, 47 South. 666, and *City of Greenwood v. Weaver* and *Allen v. State*, *supra*, it was held that, in appeals from the courts of justices of the peace and police justices, a certified copy of the record of proceedings in such courts were indispensable to the jurisdiction of the circuit court. In *McPhail v. Blann*, *supra*, the supreme court dismissed the appeal of its own motion, because of the absence of a properly certified copy of the proceedings before the justice of the peace.

The want of such a certified copy is not a defect which may be cured or waived. It is jurisdictional. Without it, the circuit court cannot proceed with the cause. It is without jurisdiction, and on appeal to this court there is no jurisdiction here. The question of jurisdiction can be raised at any time. It may be raised for the first time in this court. The court, of its own motion, will dismiss an appeal where it has no jurisdiction. The case of *Calhoun v. State*, *supra*, was necessarily overruled by *McPhail v. Blann*, *City of Greenwood v. Weaver*, and *Allen v. State*, *supra*.

The judgment of the court below is reversed, and the cause remanded, with directions to the circuit court to dismiss the appeal to that court, and award a writ of *procedendo* to the court of the police justice to enforce the judgment of his court, unless the appellant shall perfect the record of proceedings from such police court.

So ordered.

Reversed and remanded.

JAMES G. BENNETT v. STATE.

[55 South. 482.]

1. CRIMINAL LAW. *Appeal. Hearing in supreme court. Rules of court.*

Rule 23 of the supreme court provides that "the docket of criminal cases for the whole state shall be taken up on the second Monday after the Monday fixed by law for calling the docket for each district. Under this rule where a case was not on the docket for trial when the final call of the criminal docket for the session ended, it cannot be placed there, but will be continued until the court returns to the criminal docket for another trial of same.

2. SAME.

This rule is not in violation of section 72, Code 1906, which provides that "the return day in the supreme court for all criminal cases no matter from what court or county or district appealed, is the Monday of any term first after the expiration of twenty days from the date of taking the appeal, "the court having the right to make rules for the efficient, orderly and systematic conduct of the business of the court.

APPEAL from the circuit court of Yazoo county.

HON. W. A. HENRY, Judge.

J. G. Bennett was convicted of bigamy and appeals.
Motion for hearing at present term of court.

Barbour & Henry and *E. L. Brown*, for motion.

Carl Fox, assistant attorney-general, *contra*.

MAYES, C. J., delivered the opinion of the court.

In this appeal the record was filed in this court on June 5, 1911, and we are asked, by motion, to take up this case for final determination at the present sitting of the court. It appears from the record that J. G. Bennett was tried and convicted in the circuit court of Yazoo county on the charge of bigamy. The indictment was

returned and filed on April 26, 1911, and the trial concluded on May 20th, and on this date an appeal was taken to this court. The record shows that the stenographer's notes were prepared and filed in the office of the circuit clerk of Yazoo county on May 27th, approved by counsel on May 29th, the record made up by the clerk and ready to be transmitted to this court on June 2d, reaching this court and being filed on June 5th. At the time the record was filed in this court all calls for the civil and criminal docket for the entire session of the court were over, and all cases not then on the docket and ready for hearing stand continued until the next regular call. Rule 23 of this court (50 South. 8) provides that: "The docket of criminal cases for the whole state shall be taken up on the second Monday after the Monday fixed by law for calling the docket for each district." Under the above rule the final call of the criminal docket for this session ended on May 31st. The present case was not then on the docket for trial and cannot be placed there. The return day is one thing, and the time fixed by the rule of the court for the hearing of the case after it reaches the docket and becomes subject to hearing is quite another thing.

It is insisted by counsel for appellant that under section 72, Code 1906, they have a right to have this case heard at this sitting of the court. Section 72 is as follows, viz.: "The return day in the supreme court for all criminal cases, no matter from what court or county or district appealed, is the Monday of any term first after the expiration of twenty days from the date of taking the appeal." It is contended that under this section this court is required to hear any criminal case on any Monday of any term first after the expiration of twenty days from the date the appeal is taken. If this contention is correct, the court is powerless to make rules for the efficient, orderly, and systematic conduct of the business of the court. Under the present rule of the

court the criminal docket for the entire state is called six times each year. It is called three times during the first term of the court, as fixed by section 4901 of the Code, and three times in the second. When on call of each district, as required by section 4902, a part of the time is set aside for the hearing of the criminal docket of the entire state. Section 72 does not preclude this court from adopting rules for the orderly and systematic hearing of the criminal docket, or for fixing a date after the return day at which a call for the criminal docket will be made. Section 72 of the Code is intended to expedite the hearing of criminal cases, but does not make it imperative on the court to hear on every return day the criminal cases, or take away from the court the power to fix stated periods during the terms of the court for the taking up of the criminal docket. If the return day of any criminal case is on any Monday after the time fixed by rule of the court for the call of the criminal docket, the hearing of the case is necessarily carried over until the next call. Under section 72 a cause is on the docket ready for trial on the Monday first after the expiration of twenty days from the date of taking the appeal. By section 4914 of the Code this court is given the power to make rules of practice and proceeding necessary and proper for certainty and dispatch of business, when such rules are consistent with law. The rule of the court fixing the time for the hearing of the criminal docket is not only within the power of the court and consistent with law, but it is necessary to enable the court to properly handle the business before it. The rule is designed for the purpose of having frequent and certain times for the general call of the criminal docket. It is designed to prevent confusion, for the purpose of accomplishing justice to both the civil and criminal litigants. Some individual hardships may result from the rule, but this is true of almost any law that may be enacted or rule that may be adopted. The generality of litigants,

both civil and criminal, have their welfare and convenience advanced by the rule in question. If we had no power to make the rule, every Monday would be criminal call. No certainty would attend the hearing of civil cases whatever. The practice of the court as now controlled has been the practice since the Constitution of 1890, and since the Code of 1892, in which Code appears for the first time the section under review. Rule 23 of the court fixes the time for taking up the criminal docket for hearing for the second Monday after the Monday fixed by law for calling the docket of each district.

All criminal cases on the docket ready for hearing on the day of the term fixed by the rule for the taking up of the criminal docket, will be tried by the court. All other criminal cases placed upon the docket after that time, regardless of return day, as fixed by section 72 of the Code of 1906, will be continued until the court returns to the criminal docket for another trial of same. In this case the record was not filed until after the call of the docket as fixed by the rule, and the motion for hearing is denied, and cause continued for hearing at next regular call of criminal docket, in October, 1911.

So ordered.

Brief for appellant.

[99 Miss.]

CITY OF COLLINS *v.* IDA FIFE.

[55 South. 484.]

CARRYING CONCEALED WEAPONS. *Burden of proof. Instructions. Code 1906, section 1105.*

Any one indicted for carrying concealed a deadly weapon, under section 1105, Code 1906, can show as a defense, among other things, "that he was traveling and was not a tramp," but the same section provides: "And the burden of proving either of said defenses shall be on accused." An instruction which shifts this burden from the defendant to the state is erroneous.

APPEAL from the circuit court of Covington county.

HON. W. H. HUGHES, Judge.

Ida Fife was acquitted in the circuit court on the charge of carrying concealed weapons on her appeal from a conviction in the city court of Collins and the city appeals from the judgment in the circuit court.

The facts are stated in the opinion of the court.

W. U. Corley, for appellant.

We are aware of the fact that this court will not entertain an appeal on facts, in so far as the state or municipality is concerned, but in this case, there are two very principal features of law that we are not satisfied to leave without a final decision.

The court erred in excluding the testimony of Will Nobles, the principal witness in this case. The facts being, that he saw defendant, appellee here, in the morning, and while she yet retained her room at the hotel and before she had started again on her pretended journey, with the pistol, that she took it from her purse, with a threat to get to another party in the pool room; that she replaced it, when denied the privilege of entering. This made out a complete case, but added to this

and by way of bracing up his testimony, Magee and Lowery, marshal and deputy sheriff respectively, were introduced, who testified that she still had the pistol when they arrested her. It was then that the court excluded his testimony, because it was not at the same time as was the officers testimony and being too remote. This was error. The reason the officers were introduced first, was that Nobles was not present when the case was called, and the others were introduced first, to save time. The court excluded the very foundation of this suit, as being too remote and on the theory that all witnesses had to see pistol at the same time. This is not the law, and Nobles' testimony should have been permitted to go to the jury. We especially contend that his testimony was the foundation of the proceedings against this appellee, and that the officers were introduced to corroborate his statements that she still had the gun when arrested in the afternoon, and that it makes no difference whether all witnesses saw the pistol at the same time or not.

Defendant denies having any pistol in the morning, but admits having it in the afternoon, but pleads justification on the ground that she was a traveler, and as such was exempted from the statute. On this plea, the court in the face of the statute, section 1105, Code 1906, instructed the jury that the city of Collins must show beyond every reasonable doubt, both that she carried the pistol concealed and that she was no traveler. The very section under which appellee seeks shelter, concludes with the words, "And the burden of proving either of said defenses shall be on the accused," yet the jury are instructed right to the contrary. Where justification or excuse is relied on, which constitutes an affirmative matter, the burden is on the defendant, 12 Cyc. 381, and authorities cited thereunder; also, section 1105, Code 1906.

Again the court instructed the jury for the defendant that, "The court instructs the jury for the defendant, Ida Fife, that if they have a reasonable doubt from the

evidence or the want of evidence as to whether or not Ida Fife had started on a journey at the time she was arrested with the pistol they should acquit her promptly.' This is very plainly not the law. Such an instruction was equivalent to a peremptory instruction under the testimony in this case, with Nobles' testimony excluded. The traveling or setting out on a journey intended by the statute to be an excuse for carrying concealed weapons means a travel of such distance as to take one beyond the circle of his friends and acquaintances. *Gholson v. State*, 53 Ala. 519; Bish. St. Grimes, sec. 788a, and approved by this court in *McGiurk v. State*, 1 So. 103. The case of *Roseaman v. Okolona*, 85 Miss. 583, settles this case on the facts, which of course will not be considered here, but we cite it to show that with the testimony of Nobles excluded and these erroneous instructions that both principles of law has been violated by the court below.

McLAIN, C.

The appellant was convicted in the mayor's court of the city of Collins for carrying a pistol concealed. She appealed to the circuit court of Covington county, and was there acquitted. Upon the trial, her defense "was setting out on a journey," and she asked and received the following instruction: "The court charges the jury, for the defendant, that unless the city of Collins established the guilt of the defendant to a moral certainty and to the exclusion of every reasonable doubt, both that the defendant carried the pistol concealed, and that at the time she was not justifiable under the law, then it is the sworn duty of the jury to find the defendant not guilty." The city of Collins, feeling aggrieved at the giving of said instruction, appeals to this court under authority of section 40 (2), Code 1906.

The granting of the above instruction by the court was manifest error. Any one indicted for carrying concealed

a deadly weapon, under section 1105, Code of 1906, can show as a defense, among other things, "that he was traveling and was not a tramp, or was setting out on a journey, and was not a tramp." But the same section provides: "And the burden of proving either of said defenses shall be on the accused." But the above instruction in effect places that burden on the state.

Reversed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated by the commissioner, the case is reversed.

MRS. ALICE WHITE v. ILLINOIS CENTRAL RAILROAD
COMPANY.

[55 South. 593.]

1. CARRIERS. *Local freight trains. Passengers. Gross negligence.*

A regular local freight train, equipped with the ordinary appliances and conveniences of a local freight train, except that the car attached to it for the use of passengers was what is known as a "way car" with compartments for passengers, baggage, trainmen and tools used in connection with the operation of a local freight train, is neither a regular passenger train, nor a "mixed or accommodation train" within Code 1906, section 4054, limiting the liability of carriers for injuries to passengers.

2. PASSENGERS. *Carriers. Common law duty.*

At common law there is only one class of trains in the operation of which the carrier is relieved from the exercise of the utmost degree of care for the safety of passengers on such trains and that is those trains which are not intended for and do not carry passengers.

3. SAME.

In case of injury to persons riding on such trains, the carrier is not liable unless such injury is caused by its willful or intentional

wrong or gross negligence as persons riding on such trains contrary to the rules of the carrier are trespassers and even when riding by permission of the trainman in charge of such trains are bare licensees.

4. **STATUTE. *Re-enactment. Construction.***

Where a statute has been construed by the highest authority of a state and afterwards re-enacted in substantially the same terms, the legislature by such re-enactment adopts, along with the statute, such construction.

5. **JUDICIAL KNOWLEDGE.**

The courts know what a "mixed or accommodation train" is, as it is a matter of common knowledge of which the courts take judicial cognizance

6. **MIXED OR ACCOMMODATION TRAIN. *Definition.***

"A mixed or accommodation train" is a train equipped and having the appliances and facilities suited for the carriage of passengers as well as freight. Its purpose and business is as much the one as the other. In its arrangements the safety of passengers is as much looked to as the carriage of freight. It usually has two or more coaches for passengers and separate compartments or coaches for the races, and a baggage compartment or car, etc., and runs on a regular schedule, and subordinates its freight business to the passenger business to the extent necessary to make connections with other passenger trains on its own line and those on connecting roads, and it stops opposite stations for the convenient ingress and egress of passengers.

7. **FREIGHT TRAIN. *Definition.***

A freight train is not intended for both passengers and freight within the Code 1906, section 4054, limiting the liability of carriers for injuries to passengers on such trains, is one on which passenger business is subordinated to the carriage of freight and is a mere incident thereto.

APPEAL from the circuit court of Choctaw county.

HON. G. A. McLEAN, Judge.

Suit by Mrs. Alice White against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals.

The facts are sufficiently stated in the opinion of the court.

Daniel & Adams, for appellant.

When appellant had concluded her evidence in the court below, appellee made a motion for a peremptory instruction, which was granted by the court.

This case has been before this court on appeal by the railroad company from a judgment in favor of appellant, and was reversed because the evidence failed to show that the train on which appellant was riding, when she was injured, was intended for both passengers and freight (reported in 52 So. 449); but appellant has quite a different record here on this point from that presented in the former appeal.

The evidence for appellant shows conclusively that the train in question was a mixed, local or accommodation train which has been running between Durant and Aberdeen for many years, and has all these years been used by the railroad company for handling local freight and passengers; that two of these accommodation trains of like character, are, and have been, used for many years by appellee on its line between Durant, Mississippi, and Aberdeen, Mississippi, one going from Durant to Aberdeen and the other from Aberdeen to Durant each day, each train making the return trip on the day following; that each of the trains when making the run from Aberdeen to Durant is known as No. 291, and from Durant to Aberdeen as No. 292. On page forty-three of the record appears a copy of the bulletin board of appellee railroad company as posted at the depot in the town of Ackerman, as required by section 4857 of the Code of 1906. This bulletin board shows the said accommodation trains, Nos. 291 and 292, marked thereon in the same manner as the two regular passenger trains; and it was agreed that the train in question, No. 291, going south, was posted on the bulletin board at the time of the injury and has been up to the present time. It further appears from this bulletin board that on the day of the trial, the said train was marked "On Time" on said bulletin

board, in the same manner as the two regular passenger trains.

On motion of appellee, in which request appellant joined, the coach attached to said train No. 291 was examined and inspected by the jury, and considerable evidence was taken, while in and about the said coach, as to its construction, equipment, furnishings, etc. It was agreed that the coach examined was the same kind and character of car the appellant was riding in when she received the injury complained of. By further evidence taken in this connection, it was shown that the coach in question is about fifty feet long; that it was divided into three compartments, to-wit: a passenger compartment about twenty-nine and one-half feet long, including the end platform; a baggage compartment about twelve feet long with sliding doors on each side of the coach; and another compartment, six or seven feet long, in which was kept tools and other equipment for the train crew. In the passenger compartment of the coach there was a heating stove, closet, water cooler, racks for bundles, etc.; cuspidors, etc.; and the seats were arranged and placed on either side of the coach with an aisle between, the seats being cushioned, reversible and large enough to accommodate two persons just as in a regular passenger coach, there being windows at each seat; and ventilators in the upper part of the coach (some open and others closed at the time); the interior of the passenger compartment being in all particulars like a regular passenger coach, except not as nicely finished and not as long, as stated by the witnesses; and there being at the time four regular passengers seated in the said passenger compartment. There was posted in said passenger compartment of said coach the following notice: "Ten dollars fine for spitting on the floor." It is evident that appellee, in providing cuspidors for said passenger compartment of said coach and in posting the said anti-spitting notice, was endeavoring to comply with section 4856

of the Code of 1906, which requires all railroad companies to furnish each passenger reception room and passenger coaches with a suitable number of cuspidors, and to post a notice in large bold type in a conspicuous place, "ten dollars fine for spitting on the floor." Also, the following very significant notice was posted on the door leading from the passenger compartment into the baggage room, to-wit: "Passengers not allowed in the baggage room."

Plaintiff introduced C. J. Dean, a photographer, who testified to having made certain photographs of the coach, attached to one of the said accommodation trains, two days before the trial, to the introduction of which photographs defendant objected, which objection was sustained by the court, and which action of the court we submit was erroneous. It is true these photographs were of no material benefit to plaintiff, as evidence before the jury, on this trial because the jury had made a personal inspection of the coach, which it was agreed was the same kind and character in which said plaintiff was riding when she was injured; but the same opportunity might not be available at another trial; and we think the photographs were sufficiently identified (as being photographs of the identical coach examined, or one of the same kind and character, and certainly as the coach attached to one of the said local trains, both of which coaches were shown to be of the same kind and character in construction, appearance, etc.) to make their introduction as evidence proper. At plaintiff's request, the said photographs were sent up with the record in this case, and they speak for themselves and show conclusively that the coach attached to said accommodation train was no common conductor's caboose (as was stated by the court in its former opinion from the uncontradicted evidence of the witness Magee); but that judging from the outside appearance of the coach, as shown by the said photographs, as well as from the interior con-

struction, equipment, and furnishing of the said coach, as shown by the testimony of several witnesses, it was a coach intended for passengers. Plaintiff further offered in evidence a number of issues of several newspapers, some of which were excluded by the court to which exception was duly taken, which said several papers advertised the schedule of said railroad company on the line from Durant to Aberdeen, showing local trains Nos. 291 and 292 along with the regular passenger trains, and that all trains scheduled carried passengers.

Further evidence of the purpose and intention of the said local trains with reference to carrying passengers is shown by the evidence to the effect that said trains carried not only passengers, but also carried and had provisions made for the carrying of passenger's baggage. It is shown by the testimony of the witnesses, who gave description of the coach, that there was a baggage room or compartment, with sliding doors on either side of the said coach into the said baggage compartment; and it was recognized by the railroad company as a baggage room by virtue of the notice on the door leading from the passenger compartment into the said room, to-wit: "Passengers not allowed in the baggage room." It conclusively appears that passenger's baggage was checked for this train and transported thereon in the same manner as on a regular passenger train. When plaintiff was making the journey from Kosciusko to Durant on said train at the time she was injured she had her trunk checked for transportation on said train.

It is further shown by the testimony of plaintiff's witnesses and herself that they had each and all frequently ridden on the said local trains Nos. 291 and 292; and that said trains were taken and considered by the said several witnesses and by the general public as trains intended for passengers, and that said trains have been used for many years by the said railroad company, and so considered by the public to be intended, for car-

rying and transporting passengers and their baggage, in the same manner as the regular passenger trains, with the exception that when it was equally convenient to take passage on the regular passenger trains, the witnesses did so on account of the fact that the trip could be made more rapidly and that better accommodations were provided on the regular passenger trains.

It is further in evidence that the said defendant railroad company runs other trains on its line between Durrant and Aberdeen, in addition to the two regular passenger trains and the said local trains Nos. 291 and 292, which said other trains are strictly freight trains, with only the appliances of a freight train, having attached thereto a common conductor's caboose, which trains are used exclusively for carrying freight, and of course could not be said to be intended for passengers.

In the opinion rendered by the court in this case on its former appeal, 52 So. Rep. 449, the court cited the case of *Perkins v. Chicago, St. Louis & New Orleans Railroad Co.*, 60 Miss. 726, wherein this court said: "A train is strictly a freight train, with only the appliances of such a train on which persons are not sought to take passage by the offer of other accommodations than are afforded by freight trains, cannot be said to be intended for both passengers and freight, although all persons may become passengers by going into the conductor's caboose;" and we do not here question the correctness of the former decision of this case by the court, in view of the Perkins case, and in the light of the record in this case, on this point, when formerly before this court; but we earnestly contend that appellant has here a wholly different record, as to the train being intended for passengers and freight, from that contained in the record on the former appeal in this case. We submit that there is no escape from the position that said plaintiff had, at least, enough evidence on this point to make it a question of fact for the jury.

The train had arrived at Durant, its terminus: the conductor had announced the station; the train had come to a stand-still with the passenger coach near the depot; the other passengers, four or five in number, had preceded appellant out of the coach; and while appellant was endeavoring to alight from the coach, the train was suddenly moved or jerked, and in this manner appellant was thrown from the steps of the coach to the ground, and thus received the injury complained of. It is true that the authorities hold, and we think properly so, that when plaintiff took passage on said local train, she subjected herself to the inconvenience and annoyance usually and reasonably incident to travel upon such a train; but appellee railroad company certainly owed her the duty not to negligently injure her, while she was endeavoring to leave the coach, which act was necessary for her to do when the train had arrived at its terminus.

In the light of the whole record here, we respectfully submit that appellant's evidence was sufficient on all points to put the case to the jury; that the trial court committed fatal error in granting the peremptory instruction; and that therefore the case should be reversed.

Alexander & Alexander, for appellant.

Counsel for appellant class the trains operated by the Illinois Central Railroad Company and other railroad companies into three classes, viz:

1. Passenger trains.
2. Freight trains.
3. Mixed trains.

We agree that this can be considered a general classification. Counsel, however, endeavor to place the train in this case in the class of freight trains, that is, "an ordinary freight train, with the addition of a caboose or way car, whichever you may please to call it; and which

train is ordinarily found running on railroads and known as local freight."

Now, the testimony in the record shows that the train is posted as a local passenger train instead of a local freight. While the two may be the same and may be intended for both passengers and freight, we insist that the term local freight only serves to confuse the court, and the testimony classes the train as a local passenger train. It is so posted. As we stated to the court, we cannot conceive of a train carrying both passengers and freight being any differently constructed and differently operated. It must have freight and passenger cars, and we insist that the most we can say of the train is that it carried both, and is therefore a mixed train, intended to carry both. Now under the statute the train need not carry passengers exclusively, if it carries passengers and freight then gross negligence need not be shown. For if it regularly carries passengers and freight, then it cannot be said that it carries passengers for accommodation any more than it carries freight for accommodation. The Perkins case outlines the distinction, and the facts in each case control.

Counsel insists that even if the train is a mixed train, that is; carrying passengers and freight, that under the rule in the Humphrey's case, we cannot recover because no gross negligence is shown. We insist that this is not correct, no gross negligence has been shown, and need not be shown, in fact, gross negligence has nothing to do with this case. The statute says that "if a train is intended for both passengers and freight, that is, a mixed train, that there is no necessity of proving gross negligence. The fact that on certain kinds of trains, and under the peculiar circumstances of certain cases, parties are required to exercise more care than in other circumstances does not aid defendants in this case, for the reason that the negligence and the injury are not controverted in the second.

This train might have been made of hand cars, or coal cars with planks as seats, and if it carried passengers regularly and sold tickets to such passengers and so held out to the public, we insist that the circumstances would justify the court in at least leaving the matter for the jury's determination.

Now regarding section 4857 about posting bulletins. That statute does not destroy the probative value of the bulletins posted. The rules of the railroad companies require every train, in fact every car registered when it stops in a town or city. The fact is that the nature of the posting has more to do with showing the intent than the posting itself. It is not customary to post freight trains and passenger trains together on the same bulletin board under the head of "passenger trains" or designate the freight trains, or the local freight trains as "local passenger trains." The record of freight trains are not posted along with the bulletins of the passenger trains. Further the law requires the railroads to post the fact that the passenger trains are late, or "trains that carry passengers." Now if they carry passengers, they are intended to carry passengers, at least it might be inferred that they are intended for passengers, and the jury can determine that fact. As stated by Commissioner Whitfield from the bench, the statute does not define what and when a train can be said to be intended for passengers or passengers and freight, and must be inferred from the evidence. That is our case. It must be inferred from the circumstances of each case.

Referring to the question of Justice Smith from the bench regarding the effect of the judge of the lower court seeing the car and then determining from the thing itself, its nature. We do not think the statute allowing the court and jury to visit the scene of injuries, etc., deprives the jury of their right to pass on the facts as shown, and as stated, we respectfully contend that the

fact that the judge of the lower court actually saw the car, and have no more weight than if the car had been described to him accurately by witnesses. The court has no right to determine a fact when there is any reasonable ground to determine otherwise, and we insist that from the record alone there is sufficient ground to carry the case to the jury regardless of what the court saw when he visited the car in question with the jury.

Finally, we again insist that intention is a question of fact, for the jury. Counsel for defendant admitted in argument before the court that the train (the third character of train), meant in the statute, was an excursion train, we most respectfully insist, that this statute was not passed for excursionists or joy riders, if the court please, and that even if the train is mixed, no gross negligence need be proven or plead.

Edward Mayes, for appellee.

First. As to the nature and constitution of the trains to which the statute in question refers in its enactments. The trains which are operated on the Illinois Central Railroad, and on other railroads in the state, and those which could possibly be run, are, and must be classified as follows:

1. Regular passenger trains, which carry no freight but only passengers, with possibly express and mail.

2. Mixed trains; by which I mean those trains which carry freight, in freight cars and also carry at least one passenger car; by which we mean a passenger car pure and simple; one which is devoted only and exclusively to the use of passengers, and is not and cannot be used, because of its make up, for any other company purpose.

3. A freight train composed of ordinary freight cars and at least one other car is not exclusively a passenger car, but is a car used for company purposes, for the use of the train hands and of the conductor, in the dispatch

of his train business, but in which passengers are allowed to ride, if they choose.

By this I mean the ordinary freight car, with the addition of a caboose or way car, whichever you may please to call it; and which train is ordinarily found running on railroads and known as the local freight.

4. Freight trains on which no passengers are allowed to ride, and from which they are rigidly excluded; these usually being, though not necessarily so, the through freights.

Our contention is that the train in this case is shown by the plaintiff's own evidence to have been of the third class, and, therefore, the peremptory instruction was properly given.

In the case of *Perkins v. Railroad Co.*, 60 Miss. 726, this whole question was threshed out. The nature of such a train was disputed between counsel, and was expressly decided by the court. We adopt the briefs of counsel. The court will see by reference to the opinion of Judge Campbell that the latter part of the section in question is merely a substitute for section 2 of the act of March 15, 1876, which employed the terms "mixed or accommodation trains," etc.

This decision was made at the April term, 1883, and since it was made this same statute has been re-enacted in two Codes with the interpretation placed upon it, and we insist that it should be adhered to.

One feature of the present appeal consists in the fact that certain bulletins were introduced in evidence, the objects being to show that because this train was put on the bulletin board, therefore, it was a train intended for the use of passengers, as well as of freight, within contemplation of the statute in controversy. It does not so show.

Section 4857, under which these bulletins are put up, provides that, "It is the duty of every railroad to keep conspicuously placed, as the commission shall direct,

and of the form and size prescribed by it, in each reception room or depot where a telegraph office is maintained, a bulletin board which shall show the time of arrival and departure of train."

On mature consideration of this statute, we do not think that the bulletin board is required to show the time of arrival and departure of those trains which are freight trains exclusively so that from them passengers are excluded; but clearly this statute requires that the bulletin boards shall show the time of arrival and departure of all trains on which passengers are allowed to ride; and that, whether they are trains which within the sense of the statute in controversy are trains intended for the use of both passengers and freight, or whether they are not. We have reached this conclusion because of the fact that section 4857 is a penal statute, and has to be strictly construed, and because of the further fact that the statute only requires such a bulletin to be maintained at the depot where a telegraph office is maintained.

The true construction of this statute we submit, is, that the bulletin board is required to show the time of arrival and the departure of every train on which passengers are allowed to ride; not of those trains exclusively which the railroad company intends for both passengers and freight, or for passengers only. Therefore, the fact that the bulletin is kept up, sheds no light on this particular question. If the train were the precise train involved in the Perkins case cited above, the bulletin would still have to be made in order to meet the bulletin board statute.

FINALLY.

The court will observe that the declaration in this case does not allege any gross negligence; when the case was reversed and sent back for another trial, the declara-

tion still was not amended so as to charge gross negligence.

Furthermore, Mr. Alexander in his argument expressly stated that there was no gross negligence. The plaintiff's own proof shows that her injuries arose from the fact that just as she was about to step off from the train step to the landing, there came a jolt, and she fell.

Now even if this train had been mixed train, under the proof in the case, this peremptory instruction would have been right under the rule announced by this court in the *Humphrey's case*, 83 Miss. 721. In that case there was a mixed train, and the case shows what we mean by a mixed train as defined above. That was a train composed in part of freight cars and with two passenger cars. In that case there was a flying switch by which the train was so jolted that Mrs. Humphreys, who was standing in the aisle, was thrown down and injured. It was held that she could not recover because of her contributory negligence.

At the same time, the court there said expressly, that "The passenger who voluntarily takes passage on a mixed train must be deemed to assume all the inconvenience and risks usual and reasonably incident to transportation or travel upon such. Page 733.

We submit that a jolting of the nature and no severer than that which the plaintiff described in her testimony in this case, is one of the usual and ordinary risks of a mixed train.

Furthermore, the statute about the injuries suffered from the running of trains, has no application to this case, inasmuch as the plaintiff's testimony shows all of the facts and circumstances. *Railroad Company v. Humphreys*, *supra*, page 739.

Argued orally by *James Alexander* for appellant, and *Edward Mayes* for appellee.

Anderson, J., delivered the opinion of the court.

This case was here on appeal once before. On the former appeal it will be found reported under the style *Illinois Central Railroad Company v. White*, 52 South. 449. On that appeal the case was reversed and remanded, on the ground that no liability was shown on the part of the railroad company; the court holding that the jury should have been instructed to return a verdict in its favor. On the second trial, at the conclusion of the testimony, the court instructed the jury at the instance of appellee to return a verdict in its favor, which was done, and judgment entered accordingly, from which appellant prosecutes this appeal.

It is argued with great earnestness on behalf of appellant that the facts developed in this record are materially different from those shown on the first trial; that on the record here now it was a question for the jury whether the train on which appellant was injured was one "being intended for both passengers and freight," in the sense of the language used in section 4054, Code of 1906. After a most careful examination of the records on both appeals, we find there is no material difference in the facts as developed on the second trial from those shown on the first. The train on which appellant was injured was a regular local freight train, equipped with the ordinary appliances and conveniences of a local freight train, except that the car attached to it for the use of passengers was what is known as a "way car," with compartments for passengers, baggage, trainmen, and the tools and implements used in connection with the operation of a local freight train. It was neither a regular passenger train nor a "mixed or accommodation train." It is true that appellant in her testimony speaks of it as an "accommodation train;" but she also describes the character of the train, and her evidence, taken in connection with all the other evidence in the case, shows without material conflict that it was a local

freight train, and not an "accommodation or mixed train." It follows that there was no error in directing the jury to return a verdict in favor of the railroad company.

It is argued with great ability and show of reason on behalf of appellant (and it is contended in another case now in the consultation room involving this same question) that any freight train whatever which has attached to it a car for passengers to ride in, and on which passengers are invited to travel by the railroad company, is a freight train "intended for both passengers and freight." We are constrained to make an attempt to further elucidate the intent and purpose of the statute involved. The last clause of the statute (section 4054, Code of 1906) which is controlling in this case is in derogation of the common law. In determining the true interpretation of such a statute, it is a material aid to have in view the common law as it existed when the statute was enacted, in connection with the origin and history of the statute. According to the common law, the carrier owes the passenger the utmost degree of care for his safety, regardless of the character of the car or train on which he is being carried. There is no distinction in this respect between freight trains and regular passenger trains, provided such freight trains are used for the carriage of passengers.

At common law there is only one class of trains in the operation of which the carrier is relieved from the exercise of the utmost degree of care for the safety of persons traveling on such trains, and that is those trains which are not intended for and which do not carry passengers. Persons riding on such trains contrary to the rules of the carrier are trespassers, and even when riding by permission of the trainmen in charge of such trains are bare licensees. 33 Cyc. 763, 764. In case of injury to persons so carried, the carrier is not liable unless such injury is caused by its willful or intentional

wrong or gross negligence. 33 Cyc. 815. In this condition of the common law the legislature enacted chapter 155, p. 264, Laws of 1876, as follows:

"Whereas, certain railroad companies, doing business in this state, now refuse to carry passengers upon their freight trains, on account of the strict legal liability attaching to carriers of passengers; and whereas, such refusal on the part of said railroads to carry passengers upon their freight trains, results, generally, in great inconvenience, annoyance and loss to the citizens located upon the line of said roads: Therefore,

"Section 1. Be it enacted by the legislature of the state of Mississippi, that all railroad companies, running trains in this state, shall hereafter carry upon their freight trains all passengers who shall desire to ride thereon, and who shall conform to the rules of said railroads applying to passengers upon passenger trains in relation to purchase of tickets, and so forth, and such passengers upon freight trains shall be furnished with the best accommodations that said freight trains may have at that time that such passengers may apply for passage: Provided, that railroads shall not be required to furnish passengers upon freight trains any additional accommodations to those which freight trains ordinarily have.

"Sec. 2. Be it further enacted—That, in case of damage or injury to any passenger or passengers, upon any freight train, the railroad company shall not be liable therefor, except upon proof of fraud, malice, or gross negligence on the part of the company, its agents or employees: Provided, that the provisions of this section shall not apply to 'mixed' or 'accommodation' trains, so called, which are now run for the accommodation of both passengers and freight.

"Sec. 3. Be it further enacted—That any railroad company who shall refuse to carry upon any freight train, any person applying for passage thereon, who

shall conform to the rules of the railroad prescribed for passengers upon passenger trains, shall forfeit and pay to the person so refused the sum of fifty dollars, to be recovered by action before any court of competent jurisdiction.

“Sec. 4. Be it further enacted—That the provisions of this act shall not apply to through freight trains run by telegraphic order.”

This statute was revised and brought forward into the Code of 1880, forming section 1054 of that Code, which appears in the same language in section 3557 of the Code of 1892, and section 4054, Code of 1906, which is as follows: “Every railroad company shall be liable for all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of its agents, engineers, or clerks, or for the mismanagement of its engines; but for injury to any passenger upon any freight train not being intended for both passengers and freight, the company shall not be liable except for the gross negligence or carelessness of its servants.” In *Perkins v. Railroad Co.*, 60 Miss. 726, Judge Campbell, who prepared the original draft of the Code of 1880, speaking for the court, said: “The train on which the appellant was a passenger was a ‘freight train,’ not being intended for both passengers and freight, within the meaning of section 1054 of the Code of 1880, and the action of the circuit court upon the instructions was correct. The latter part of that section is a substitute for section 2 of the act of March 15, 1876 (acts 1876, p. 265), which employed the terms ‘mixed’ or ‘accommodation’ trains ‘run for the accommodation of both passengers and freight.’ A train which is strictly a freight train, with only the appliances of such a train, on which persons are not sought to be induced to take passage by the offer of other accommodations than are afforded by freight trains, cannot be said to be intended for both passengers and freight, although all

persons may become passengers by going into the conductor's caboose. They who take passage on such a train cannot expect, and have no right to demand, the conveniences and attention required with respect to passenger trains or those intended by the carrier for both freight and passengers."

It will be noted that the court says in that case that the latter part of section 1054, Code of 1880, is a substitute for section 2 of the act of 1876, *supra*. In the case of *Illinois Central Railroad Co. v. Trail*, 25 South. 863, the court speaks of the train on which the injury occurred as a through freight train. We have examined the record in that case, and find that it was a freight train which did not stop at all stations; but the appellee, Trail, testified that it carried passengers, tickets were sold for it, and he paid the conductor on this occasion because he had not time to purchase a ticket, and that it had attached to it a regular passenger caboose. The court held that the railroad was only liable for gross negligence because the train in question was not "designed to carry passengers." We understand the court to hold, in *Perkins v. Railroad*, *supra*, that the proviso to section 2 of the act of 1876 means the same thing as the latter part of section 1054, Code of 1880 (section 3557, Code 1892, and section 4054, Code 1906). The evident purpose of the legislature in the adoption of this statute was to relieve railroad companies from the exercise of the highest degree of care as to passengers on all freight trains whatsoever, except "mixed or accommodation trains," which were left as at common law.

Since the construction put on this statute in *Perkins v. Railroad Company*, *supra*, it has been twice re-enacted in the same language in the Codes of 1892 and 1906. The rule is that where a statute has been construed by the highest court of a state, and afterwards re-enacted in substantially the same terms, the legislature by such re-

enactment adopts, along with the statute, such construction.

What is intended by the language "intended for both passengers and freight," or "mixed or accommodation trains," which are synonymous in meaning? The court knows what a "mixed or accommodation train" is, for everybody knows. It is a matter of common knowledge, of which the court takes judicial notice.

In section 2 of the act of 1876, *supra*, the words "mixed" or "accommodation" are put in quotations, and are referred to as "so-called" showing that it was a matter of general understanding at that time what class of trains was intended to be covered by the proviso to that section. A "mixed or accommodation train" is a train equipped and having the appliances and facilities suited for the carriage of passengers as well as freight. Its purpose and business is as much the one as the other. In its arrangements, the safety of passengers is as much looked to as the carriage of freight. It usually has two or more coaches for passengers, and separate compartments or coaches for the races, and a baggage compartment or car, etc., and runs on a regular schedule, and subordinates its freight business to the passenger business to the extent necessary to make connections with other passenger trains on its own line and those on connecting roads, and it stops opposite stations for the convenient ingress and egress of passengers.

On the other hand a freight train, not intended for both passengers and freight, or which is not a "mixed or accommodation train," in the meaning of this statute, is a regular freight train on which passengers are invited to travel, having for their convenience a caboose, way car, or passenger coach attached, but has none of the other equipment or appliances of a regular passenger train, beyond what all freight trains have, and in making its schedule does not make connection with other trains on its line or those of connecting carriers, if pre-

vented by the proper handling of its freight business; in other words, a train on which a passenger business is subordinated to that of the carriage of freight—a train the paramount object of which is the carriage of freight, and not of passengers.

It might be in some cases a question of fact for the jury whether a given train is one intended for both passengers and freight in the meaning of this statute. But where the evidence shows without conflict, as it does in this case, that the train in question was not a “mixed or accommodation train,” but a regular local freight train, carrying passengers as a mere incident, there is no question for the jury. *Affirmed.*

J. E. CAROTHERS ET AL. v. T. M. MOSELEY ET AL.

[55 South. 881.]

UNION OF CHURCH ORGANIZATIONS. *Validity.*

Where the right to property in controversy depends upon the validity of the union of two churches, the courts will not undertake to determine the validity of such union, as this is purely an ecclesiastical question, but will accept the decision, as to the validity of such union by the highest ecclesiastical authority of the church and award the property in accordance therewith.

APPEAL from the chancery court of Clay county.

HON. J. Q. ROBBINS, Chancellor.

Suit by J. E. Carothers et al. against T. M. Moseley et al. From a judgment for defendant, plaintiff appeals.

The facts are sufficiently stated in the opinion of the court.

W. C. Caldwell, for appellant.

It is no answer, we submit, to our reliance on the decision of this court in *Mt. Helm Baptist Church v. Jones*, 79 Miss. 488, as conclusive in favor of appellants, to say, as counsel for appellee have said, that the church, whose property was involved in that case, was of the Congregational class, and that the church, whose property is involved in this case, is of the Associated class. The nature and inviolability of the trust must be the same in each instance. The decision in that case was not founded on any distinction between the two classes; but on the ascertained existence of the trust for a particular congregation of a particular denomination of Christians and on the continued adherence thereto by some of the members and the departure therefrom by others, as in the present case.

A house of worship can be no more sacred against diversion because conveyed to trustees for the benefit of a Baptist congregation, nor any less sacred against diversion because conveyed to trustees for the benefit of a Cumberland Presbyterian congregation. The trust is manifestly the same whether the church, for whose benefit it is created, be of the one class or the other; and courts of equity will protect it and enforce it in each instance alike.

The question here is not whether the Cumberland Presbyterian church at West Point is of the congregational class or of the associate class (though it is admittedly of the latter class); but whether the deed creates a trust and, if so, for what particular local church and who are the present adherents. Confessedly any congregation of any church of either class may lawfully be made the beneficiary of a religious trust, and terms sufficient to create such a trust for a congregation in the one class will suffice to create a trust for any congregation in the other class.

The terms and intent of the instrument, and not the class to which the beneficiary belongs, must be controlling when civil courts come to its construction and enforcement. A deed to one church like a deed to another church and like a deed to an individual must always be construed and enforced according to its terms and intent. It was so in the Mount Helm Baptist Church case, and it should be so in this case.

Civil rights are measured and controlled by the civil law and not by ecclesiastical polity. A conveyance of land is a civil contract. The rights resulting therefrom are civil rights, and they are obviously the same and bound to be the same whether the title be vested in trustees for the benefit of a Baptist congregation, or in trustees for the benefit of a Cumberland Presbyterian congregation. The trust created in either case is the same, and is equally protected by the civil law. The terms and intent of the deed are the same in each instance, and the law is no respecter of persons. A trust is a trust, and its beneficiaries are those who answer the description of the deed. *Mt. Helm Baptist Church v. Jones*, 79 Miss. 488; *Finley v. Brent*, 87 Va. 103, 11 L. R. A. 215; *Landrith v. Hudgins*, 121 Tenn. 676, 677; *Boyles v. Roberts*, 222 Mo. 690, and other authorities cited on pages 15, 20 and 21 of our original brief.

As before remarked, the decision of this court in the Mt. Helm Baptist Church case was not based on any difference in policy between churches of the congregational class and those of the associated class; but alone on the ascertained existence of a trust for a particular congregation of a particular denomination of Christians and the adherence thereto by some of the membership and the departure therefrom by others, as in the present case. The same remark is equally applicable to the adjudged cases generally, some of them having been of the one class and some of the other. For instance, in *Smith v. Pedigo*, 145 Ind. 361, 32 L. R. A. 839; *Mt. Zion*

Baptist Church v. Whitmore, 83 Iowa 147, 13 L. R. A. 198; *Park v. Champlin*, 96 Iowa 55, 31 L. R. A. 141, the trust was in favor of churches of the Congregational class as in the Mt. Helm Baptist Church case; and in *Brent v. Finley*, 87 Va. 103, 11 L. R. A. 314; *McKinney v. Griggs*, 5 Bush. 401, 6 A. D. 361; *Gartin v. Penick*, 5 Bush. 110; *Godfrey v. Walker*, 42 Ga. 562; *Watson v. Garvin*, 54 Mo. 343; *Boyles v. Roberts*, 222 Mo. 690; *Deaderick v. Lampson*, 11 Heis. 529; *Bridges v. Wilson*, 11 Heis. 458; *Rodgers v. Burnett*, 108 Tenn. 173; *Landrith v. Hudgins*, 121 Tenn. 676, and *Free Church of Scotland case*, Law Reports, Appeal Cases, 1904, p. 611, and 4. N. J. Ch. R. (3 Green) 77, the trust was in favor of churches of the associated class. In all of these cases of each class (and the number of cases of each class could be greatly multiplied), the courts construed and applied the trusts according to the terms and intent of the deed and awarded the property to those answering its description, just as was done by this court in the Mt. Helm Baptist Church case, and as we ask it to do in this case.

Alexander & Alexander, for appellees.

Counsel filed an elaborate brief tracing the organization, history and union of the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America contending that the union of the two churches was valid and was a purely ecclesiastical question with the decision of which the courts of the state should not interfere and citing the following authorities: *Fussell v. Hail*, 233 Ill. 73, 84 N. E. Rep. 42; *Ramsey v. Hicks*, 91 Rep. 344; *Landrith v. Hudgins*, a Tennessee case (decided in 1907), 120 S. W. Rep. 790; *Wallace v. Hughes*, January 1909, 150 S. W. Rep. 696; *Permanent Committee of Missions v. Pacific Synod of Presbyterian Church*, 106 Pac. Rep. 401, 80 U. S. 729, 20 L. Ed. 666, 24 Am. & Eng. Ency. of Law, 338; *Brown v. Clark*, 116 S. W. Rep. 364; *Boyles v. Roberts*, April

Term, 1909, 222 Mo. 651; *First Presbyterian Church v. First Cumberland Presbyterian Church*, 91 N. E. Rep. 769; *Mount Zion Baptist Church v. Whitmore*, 83 Iowa, 147; *Hale v. Everett*, 63 N. H. 9; *Nance v. Busby*, 91 Tenn. 305; *Bear v. Heasley*, 98 Mich. 279; *Mack v. Kime*, 129 Ga. 1; *Brown v. Clark* (Tex.), 116 S. W. 360; *Parament Committee v. Pacific Synod* (Cal.), 106 Pac. 395; *Wallace v. Hughes* (Ky.), 115 S. W. 684; and has been held invalid in *Landrith v. Hudgins* (Tenn.), 120 S. W. 783; *Boyles v. Roberts*, 222 Mo. 613; *Ramsey v. Hicks*, (Ind. App.), 89 N. E. 597; *General Assembly of Free Church of Scotland v. Lord Overtoun*, Law Rep. Appeal cases, p. 612; *Watson v. Jones*, 13 Wall, 679, 20 L. Ed. 666; Cyc. 1140; Cyc. 1141, citing 92 Fed. 214; *Dayton v. Carter*, 206 Pa. St. Rep.; *Winebrenner v. Colder*, 43 Pa. 244; *Schnore's Appeal*, 67 Pa. 138; *Checher v. Shiray*, 163 Pa. 534; *Schlichter v. Keiter*, 156 Pa. 119; *German Reform Church v. Seibert*, 3 Pa. 282; *O'hara v. Slack*, 90 Pa. 477; *McAuley's Appeal*, 77 Pa. 397 (27 P. F. Smith, 397); *State ex el. v. Watson*, 45 Mo. 183; *Pounders v. Ash*, 44 Neb. 672, 63 N. W. 48, and see *Lamb v. Kane*, 14 L. R. A. 518; *First Presbyterian Church of Louisville v. Wilson*, 77 Ky. (14 Bush.) 252; see, also, *Wilson v. John's Island Presbyterian Church*, 2 Rich. Eq. 192, 24 L. R. A. N. S. 692.

Argued orally by *W. C. Caldwell* and *W. B. Lamb*, for appellants, and *Jno. M. Gant* and *C. H. Alexander*, for appellees.

SMITH, J., delivered the opinion of the court.

The questions here involved which grow out of the union of the Cumberland Presbyterian Church and the Presbyterian Church, U. S. A., have been passed upon by ten supreme courts, each of them rendering a lengthy and well-considered opinion thereon, so that the discussion comes to us almost, if not fully, exhausted. In *Landrith v. Hudgins*, 121 Tenn. 556, 120 S. W. 783, and

Boyles v. Roberts, 222 Mo. 613, 121 S. W. 805, the contention of appellants was upheld; and in the cases of *Mack v. Kime*, 129 Ga. 1, 58 S. E. 184, 24 L. R. A. (N. S.) 675; *Brown v. Clark*, 102 Tex. 323, 116 S. W. 360, 24 L. R. A. (N. S.) 670; *Ramsey v. Hicks* (Ind.), 91 N. E. 344, 30 L. R. A. (N. S.) 665; *Presbyterian, etc., v. Cumberland, etc.*, 245 Ill. 74, 91 N. E. 761; *Wallace v. Hughes*, 131 Ky. 445, 115 S. W. 684; *Permanent Committee of Missions v. Pacific Synod*, 157 Cal. 105, 106 Pac. 395; *Sanders v. Baggerly* (Ark.), 131 S. W. 49, and *Harris v. Cosby* (Ala.), 55 South. 231, the contention of appellees was upheld.

The property here in controversy is not held under a deed by which it is devoted to the teaching, spread, or support of any specific form of religious doctrine or belief, but under a deed which simply conveyed it for the use of the Cumberland Presbyterian Church at West Point, Miss. The question we are called upon to determine, therefore, is simply which faction is the true representative or successor of the Cumberland Presbyterian Church at West Point, Miss., as the same was constituted prior to the schism therein caused by the union of the Cumberland Presbyterian Church with the Presbyterian Church, U. S. A. In order for us to do this, it is only necessary that we ascertain whether the union of the two churches was valid. If so, appellees are entitled to the property; if not, appellants are entitled thereto. The validity of this union is purely an ecclesiastical question, involving the doctrine, discipline, ecclesiastical law, rule, and custom of the Cumberland Presbyterian Church. Such questions this court will not for itself determine, even where property rights are involved, but will accept the decision thereof by the highest ecclesiastical authority of the church. *Mt. Helm Baptist Church v. Jones*, 79 Miss. 488, 30 South. 714; *Smith v. Charles*, 24 South. 968.

This rule is supported by numerous decisions of other courts, but we will refer only to the leading case of *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666, and to the cases hereinbefore cited as upholding appellee's contention. In *Watson v. Jones* the court, speaking through Mr. Justice Miller, said: "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that these decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian Churches) has a body of constitutional and ecclesiastical law of its own, to be found in their written

organic laws, their books of discipline, in their collection of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law, which should decide the case, to one which is less so." The best discussion of the other side of this question will be found in the scholarly opinion of Mr. Justice Neil in *Landrith v. Hudgins, supra*.

It may be that cases may arise wherein the decision of the ecclesiastical tribunal is so palpably erroneous, or so manifestly in excess of its jurisdiction, that the civil courts ought to decline to be bound thereby. Such, however, is not the case here, and consequently we are not called upon to express an opinion thereon. Under the Presbyterian system of ecclesiastical government, the highest authority charged with the determination of the matter here in controversy is the General Assembly. Its decision as to the validity of this union, therefore, will be accepted by this court, and the property in controversy given to the faction adhering thereto.

Affirmed.

MOBILE, JACKSON & KANSAS CITY R. R. Co. v HITT AND
RUTHERFORD.

[55 South. 484.]

1. JUSTICE OF THE PEACE. *Jurisdiction. Amount in controversy. Code 1906, § 2723.*

Under Code 1906, § 2723, providing that "justices of the peace shall have jurisdiction of all actions for the recovery of debts or damages or personal property, where the principal of the debt, the amount of the demand, or the value of the property sought to be recovered, shall not exceed two hundred dollars," where the plaintiff honestly believes and contends for the recovery of a sum above the jurisdiction of a justice of the peace, the circuit court has a right to enter jurisdiction because in such case the amount demanded is the real amount in controversy between the parties and this fixes the jurisdiction.

2. SAME.

But where there is no uncertainty as to how much the plaintiff seeks to recover, it can make no difference what amount is claimed in the declaration, if in truth, there is no real demand for a sum sufficient to give the circuit court jurisdiction.

APPEAL from the circuit court of Union county.

HON. W. A. ROANE, Judge.

Suit by Hitt & Rutherford against the M. J. & K. C. R. R. Co. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Flowers, Alexander & Whitfield, for appellant.

As the original declaration was against two carriers having connecting lines, for a demand of practically three hundred and thirty dollars, and one was settled with and eliminated, the action should have been dismissed as to the other carrier; the demand being actually less than two hundred dollars.

C. Lee Crum, for appellee.

The pleadings when honestly made determine the question of jurisdiction as to amount in controversy. *Fern v. Harrington*, 54 Miss. 733; *Rass v. R. R. Co.*, 61 Miss. 12; *Martin v. Harding*, 52 Miss. 694; *Ball et al. v. Sledye*, 82 Miss. 749.

When a court once acquires jurisdiction of a person or the subject-matter of litigation the jurisdiction cannot be taken away by the occurrence of subsequent events, because the jurisdiction of a court depends upon the state of things at the time of the institution of the suit and not upon a state of facts existing at the time of the trial. *Morgan v. Morgan*, 2 Wheat. (U. S.) 290; *Mollan v. Turrance*, 9 Wheat. (U. S.) 537; *Dunn v. Clarke*, 8 Pet. (U. S.) 1; *Connolly v. Taylor*, 2 Pet. (U. S.) 556; *U. S. v. Dawson*, 15 Howard (U. S.) 467; *Culver v. Woodruff Co.*, 5 Dill. (U. S.) 392; *Gilmer v. Grand Rapids*, 16 Fed. Rep. 708; *Raymond v. Butterworth*, 139 Mass. 471; *Tapley v. Martin*, 116 Mass. 275.

MAYES, C. J., delivered the opinion of the court.

This suit was instituted in the circuit court of Union county. The first declaration filed by appellees was jointly against the Mobile, Jackson & Kansas City Railroad Company and the St. Louis & San Francisco Railroad Company. The purpose of the suit was to recover the sum of three hundred twenty-nine dollars and twenty cents claimed as damage to cotton belonging to appellees and occasioned by the failure of the two railroads to transport and deliver certain shipments of cotton made by them from Ingomar to Memphis over the lines above indicated. The damage is alleged to have been sustained both because of delay in the shipment and because of negligence in handling the cotton. It is alleged that the negligence consisted in allowing the cotton to be exposed to the weather, and that it injured and rotted some of

the cotton. The amount claimed in the first suit was three hundred twenty-nine dollars and twenty cents as the entire damage done to the cotton. The first declaration was filed some time in January, 1907. Some time later, and before the trial of the suit, it appears that the St. Louis & San Francisco Railroad Company paid to appellees the sum of one hundred and fifty dollars on account of this alleged injury. This was a part of the amount claimed to be due for damage in the original declaration. In February, 1908, nearly a year after the filing of the first declaration, an amended declaration was filed, and in this amended declaration the suit was dismissed as to the St. Louis & San Francisco Railroad Company, and brought against the Mobile, Jackson & Kansas City Railroad Company alone. The damage claimed in the amended declaration is the same as that demanded in the original declaration, and for damages to the same cotton, although one hundred and fifty dollars had been received as a payment for a part of this damage; the one hundred and fifty dollars being paid by the St. Louis & San Francisco Railroad Company. This, of course, left only a balance of about one hundred seventy-nine dollars and twenty cents. On the trial of the case, Mr. Rutherford, one of the plaintiffs, testified that the only damage that he ever claimed on account of the cotton was in the sum of three hundred twenty-nine dollars and twenty cents; that the Frisco System had paid him one hundred and fifty dollars of this amount as their damage, and he discharged them. In other words, it appears from the testimony of Mr. Rutherford that the only damage he ever claimed was done to this cotton amounted to the sum of three hundred twenty-nine dollars and twenty cents; that prior to the filing of the amended declaration he received one hundred and fifty dollars from the Frisco Railroad Company as the part of the damage admitted to be due him by that system. Since the damage claimed for the entire cotton on ac-

count of delay and neglect was three hundred twenty-nine dollars and twenty cents, and one hundred and fifty dollars of this was paid at the date the amended declaration was filed against the Mobile, Jackson & Kansas City Railroad Company, the circuit court was without jurisdiction. At the time the amended declaration was filed, the real amount claimed could only be one hundred seventy-nine dollars and twenty cents.

Section 2723, Code of 1906, provides that "justices of the peace shall have jurisdiction of all actions for the recovery of debts or damages, or personal property, where the principal of the debt, the amount of the demand, or the value of the property sought to be recovered shall not exceed two hundred dollars." The amount of the demand in this case was not above one hundred seventy-nine dollars and twenty cents, and this is shown by the undisputed testimony of the plaintiff himself. The case of *Griffin v. McDaniel*, 63 Miss. 121, is directly in point on the facts of this case, and distinguishes the cases of *Fenn v. Harrington*, 54 Miss. 733, and *Ross v. Natchez R. R. Co.*, 61 Miss. 12. In the *Griffin case*, *supra*, it is held that, where the plaintiff honestly believes and contends for the recovery of a sum above the jurisdiction of a justice of the peace, the circuit court has a right to entertain jurisdiction, because in such case the amount demanded is the real amount in controversy between the parties, and this fixes the jurisdiction; but where, as in this case, there is no uncertainty as to how much the plaintiff seeks to recover, it can make no difference what amount is claimed in the declaration, if in truth there is no real demand for a sum sufficient to give the circuit court jurisdiction. In short, whatever may be the allegation of damages in the declaration, if the facts in the case show beyond dispute that the sum sought to be recovered is less than two hundred dollars, and that this fact is known to plaintiff when he sues, the circuit court has no jurisdiction to entertain the suit.

Reversed and remanded.

WILL HENRY ECHOLS v. STATE.

[55 South. 485.]

1. HOMICIDE. *Provocation of difficulty. Uncommunicated threats.*

A father who learns of the seduction of his daughter has the right to seek the seducer for an explanation and for a peaceful adjustment of the matter; and in seeking this end, he has the further right to arm himself, not with the intention to provoke a difficulty, but to protect himself if necessary, in self-defense.

2. UNCOMMUNICATED THREATS. *Evidence.*

Uncommunicated threats are admissible on the trial of a criminal case when there is a conflict in the testimony as to who was the aggressor, where they throw light on the significance of the acts of the deceased.

5. CONDITIONAL THREATS.

On the trial of a homicide case conditional threats of deceased are admissible, where the condition of the threats of deceased had materialized.

APPEAL from the circuit court of Tate county.

HON. L. F. RAINWATER, Judge.

Will Henry Echols was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

J. F. Dean, for appellant.

The court erred in refusing instruction "No. 1 refused" as requested by appellant. The theory and the argument of the state was that appellant learned of the seduction of his daughter; that he at once armed himself, sought defendant for the purpose of killing him, provoked the difficulty by the very fact of the carrying of the weapon, and did kill him. This instruction states the law as asked; that he had the right to arm himself and seek the interview and that carrying the weapon was

of itself no provocation. It meets their argument by a sound proposition of law. If it is the law, appellant was entitled to it and it is reversible error to refuse it. *Patterson v. State*, 75 Miss. 670.

"A man who is told by his wife of insulting conduct by a third person towards her has a right to seek for an explanation and to ask a retraction, and in so doing he has the right to arm himself to resist any anticipated attack." 83 S. W. (Tex. Crim. App.) 822; *Allison v. U. S.*, 160 U. S. 203, 40 L. Ed. 395.

The refusal of the next instruction will be argued with the rejection of the evidence upon which it was based, which constitutes the next assignment of error. If the court was right in excluding all evidence of threats, then it was right in refusing an instruction predicated upon threats, but the converse is true. If the evidence as to threats made by deceased against appellant should have been admitted, then the instruction should have been given.

Appellant testified that his daughter Etta said "Pointelle told her he would kill her if she said anything about it, and if I said anything to him about it he would kill me too." This on the objection of the state was excluded from the jury. Mose Faulkner testified Pointelle said to him in the presence of his wife, "If he, Will Henry, ever fooled with me, I am going to kill him." Anna Faulkner testified that three or four days before Christmas Pointelle said to her, "If Will Henry ever fooled with him that he was going to kill him." Both of these statements were excluded by the court upon the objection of the state over the protest of the defendant.

It is impossible to conceive upon what ground the court excluded all threats, communicated or uncommunicated. It could not have been because no overt act on the part of deceased was shown, because if defendant's testimony is to be believed, he acted solely in self-defense and was entitled to an acquittal. In fact, the court recog-

nized this and instructed the jury fully as to defendant's right of self-defense; his right to anticipate the attack of his adversary and his right to stand his ground, if he was not the aggressor; yet when he offered evidence of threats recently made by the deceased against him directly to show to the jury which was the probable aggressor, the court promptly excluded the evidence.

It could not have been because the language used did not import a threat. "Language to be competent as a threat need not be a direct statement of an intention to inflict an injury, but may threaten indirectly, by way or inference or inuendo. It is sufficient if the statement indicate a contemplation of some hostility or violence, and the fact that it is susceptible of an innocent construction does not serve to exclude it. Threats are not inadmissible merely because conditional, but under some circumstances the conditions must be shown to have been met. 6 Ency. Ev., p. 638 and notes. In *Keener's case*, 18 Ga. 194, referred to and approved by this court in *Johnson v. State*, 54 Miss. 430, the threats were that he had made him leave the brothel two or three times and that if he ever crossed his path he would kill him. This was held to be a threat and admissible. A threat that a saloon keeper must stop selling liquor or lose his life, or that he, the threatener would lose his, is competent evidence upon the trial of the saloon keeper for killing the threatener. *Duke v. State* (Ind.), 71 Am Dec. 370.

Admit that the threats were conditional, "If he speaks to me about it, I will kill him, too." "If he tackles me about it, I will kill him." "If he fools with me, I will kill him." When these expressions were used Pointelle knew the cruel wrong he had committed against appellant. He knew that when that wrong was discovered that Will Henry would most probably "speak to him about it," "tackle him about it," or "fool with him about it." On the fatal morning his guilty conscience made him

afraid to meet the man he had wronged. The conditions were met; Will Henry was there to speak to him about his great wrong. He was there to tackle him to know why it was so, and what reparation he proposed to make. He was there to fool with him as the outraged and indignant father of his seduced daughter, and according to the testimony of the defendant, Pointelle then attempted to carry his threats into execution. He had been spoken to about it; he had been tackled about it. Will Henry had hunted him up and attempted to fool with him about it, or to discuss the matter with him and he had attempted to make good his threat by trying to kill Will Henry. So the fact that the threats are conditional, or in a conditional form, can make no difference in this case. They are admissible and their weight is for the jury. In *Harris's case*, 72 Miss. 99, evidence of threats and instructions thereon were excluded. This court said, "We cannot weigh the testimony offered in the light of the charges refused or the testimony detailed above in the light of these charges, supposing them to have been given. It was for the jury to say with this testimony in and these instructions given, what credit they would give defendant's witnesses and theory." And the cause was reversed. In *Watson's case*, 81 Miss. 700, the evidence of threats was admitted in the absence of the witness, but the cause was reversed because the vital importance of the testimony and the defendant's right to have his witnesses present before the jury.

"Uncommunicated threats are admissible when there is a reasonable doubt who was the aggressor; where they throw light on the significance of the acts of the deceased." *Sinclair v. State*, 87 Miss. 330; *Johnson v. State*, 54 Miss. 430. In the last case the doctrine is fully discussed.

"The court will reverse for refusal to admit threats if the record is doubtful or the evidence conflicting." *Holly v. State*, 55 Miss. 424; *Hendrick v. State*, 55 Miss.

436; *Spivy v. State*, 58 Miss. 858; *Guice v. State*, 60 Miss. 714.

I call the court's special attention to *Hawthorne v. State*, 61 Miss. 749, which is directly in point and decisive of this case.

"Evidence of uncommunicated threats are admissible where there is doubt as to who begun the difficulty. Who is the aggressor is doubtful where there is conflict in the testimony." *Johnson v. State*, 66 Miss. 189; *Bell v. State*, 66 Miss. 192; *Wiggins v. U. S.*, 93 U. S. 465; *Allison v. U. S.*, 40 Law Ed. 395.

M. H. Thompson, for appellee.

Counsel for appellant complains of the refusal of the trial judge refusing to give instruction marked number "11."

Everything asked for in this instruction was given by the court in the instruction just above referred to. Counsel complains that the court refused to give this instruction stating that appellant had a right to carry his rifle with him to use, if necessary, in his self-defense. The instruction above quoted instructs the jury on this very point, saying that if he, defendant, had his rifle with him and used it in defending himself, he was not guilty. Then, if this part of the case had been covered by an instruction, it was clearly the right of the court to refuse another instruction on the same point.

The main attack of counsel for appellant on the record in this case is the exclusion of certain alleged threats made by the deceased against the appellant, by the trial judge.

In the testimony of Anna Faulkner, a daughter of appellant, is found this statement, "I saw Pointelle at my house three or four days before Christmas and he said, if he was to fool with him, he was going to kill him." The court sustained an objection by counsel for the state to the introduction of this testimony and excluded it

from the consideration of the jury. There is no contention on the part of counsel for appellant that this threat, if one, was communicated to the defendant. It is conditional, if he fools with me, I will kill him, then we have at best an uncommunicated, conditional threat. I submit that this was only a statement that the deceased was going to defend himself, if attacked by the appellant. Appellant himself says that he carried his rifle with him at all times; he also says that he had ordered the deceased to leave his, appellant's home, and admits having had a difficulty with the deceased and that he had not seen him any more until the morning of the killing, bad blood, mad, carrying his rifle all the time; in view of this state of affairs, we submit that the only reasonable construction to be put on the statement of deceased is that he intended to defend himself if appellant attacked him.

The deceased did have reason, from the acts and statement of appellant, that would give him, deceased, an apprehension that he might be attacked by the appellant, and his statement was equivalent to saying I am going to defend myself.

Uncommunicated threats were first declared admissible as evidence in this state in *Johnson v. State*, 54 Miss. 430. In this case the court said: "Where the testimony leaves it doubtful which was the aggressor, recent threats of the deceased against the accused, although never communicated to the latter, are admissible as tending to show the character of the killing." Also, "They will be excluded where living witnesses negative any assault by the deceased." Can the court say, after a careful examination of this record, that the deceased made any assault on the appellant? A perusal of this record shows that the appellant armed himself with a Winchester rifle, sought the deceased at his, deceased's home and when deceased told appellant that he was afraid to come out on a man who had his gun, said,

"Come on, I am here with my gun because I carry it with me all the time." Deceased starts out of the room, passing by his own gun lying on the bed, and opens the door of the room. In the meantime appellant has gotten off his mule, crossed the yard and stepped up into the open passage in front of the deceased's room, carrying his rifle with him. The deceased expected to find him on his mule out at the yard gate, but here just as he, deceased, opens the door, finds appellant in it with his drawn or extended rifle. Just at this point, the evidence for the state and defendant conflict, or the statement of appellant and the witnesses for the state cross slightly. Appellant says that the deceased grabbed the rifle; witnesses for the state say that the deceased grabbed the rifle after appellant had shot. Taking appellant's statement as true, upon which counsel for appellant attempts to predicate the competency of the alleged threats; appellant stating that deceased grabbed the rifle after opening the door and finding me, appellant, standing in the door with the rifle in my hands. Appellant says that he had just learned that morning that deceased had seduced his daughter; that he was mad; that this was his second trip over there to see deceased that morning; and when deceased opened the door and saw appellant standing there with his rifle, the mad expression on his face, expecting to find appellant outside the yard, under the circumstances, what is the only reasonable theory of his, deceased, grabbing the rifle barrel? Upon the answer to this question by the court, I am willing to rest the results of the case, if the court believes the deceased was making an assault upon the appellant, that the deceased was the aggressor by this grabbing of the rifle barrel, then the alleged threats are competent and should have been allowed as evidence. The only reasonable inference that can be drawn from this testimony is that deceased was only protecting himself from the premeditated assault of appellant. Does this testimony,

and the only testimony of deceased grabbing the gun before the first shot was fired by appellant himself, leave any doubt as to whom was the aggressor? And unless it does, the threats are not competent. *Johnson v. State*, 54 Miss. 430.

The appellant says in his testimony, "The last shot I fired was when the deceased was turning around, with his hand raised and extended outwards and open." The first two shots appellant claims were accidental; yet the deceased was shot five times, and there is no proof that deceased had a weapon of any nature. The appellant says he observed no weapon on the deceased. In *Johnson v. State*, 66 Miss. 189, the court said: "Evidence of previous uncommunicated threats is admissible in cases where it is doubtful who began the difficulty, as tending to solve the doubt." Also, "such evidence is also admissible when it is clearly shown that the deceased, and not the accused, was the aggressor."

In 61 Miss. 749, the court says that there must be some overt act on the part of the deceased. This act must show an intention of carrying into effect the threats; it must be hostile.

In *Sinclair v. State*, 87 Miss. 330, which case counsel for appellant cites, both contestants drew a pistol. There was evidence to show that deceased was the aggressor and the court said, "In cases of doubt as to who the aggressor was, uncommunicated threats are competent."

Argued orally by *F. F. Dean*, for appellant, and *Jas. R. McDowell*, assistant attorney-general, for appellee.

McLAIN, C.

Will Henry Echols, the appellant, was convicted of murder in the circuit court of Tate county and sentenced to the penitentiary for life. From this judgment he appeals to this court.

The record discloses that he was a negro man, about sixty years old, and had a family consisting of a wife

and twelve children. He was a thrifty, honest, and peaceable citizen, possessing the confidence and respect of all. His good character was abundantly testified to by his white neighbors, as well as those of his own race. No finer example of honorable and worthy citizenship could have been shown or selected from his race. Pointelle Echols, commonly called Shoat Echols, was a cousin to appellant, and had lived at his house for the past seven or eight years. He was about thirty-eight years old and unmarried. About six weeks prior to the killing of Shoat by appellant, he (appellant) requested Shoat to leave his home and seek quarters elsewhere, for the reason he was of the opinion that Shoat had assisted one of his young daughters to elope and marry without his consent. On the night preceding the morning of this fatal difficulty, appellant's wife informed him that she had just discovered that their sixteen year old daughter, Etta, was pregnant. His daughter informed her father, when he asked her about it, that Shoat had accomplished her ruin, and stated to him that the reason she had not disclosed it to him and her mother before was that Shoat told her, if she told it, he would kill her, and that if appellant, her father, said anything about it to him, he would kill him. On the trial this statement was excluded from the jury.

Early next morning appellant, armed with a Winchester rifle, went at once to Henry Ward's house (where deceased lived), some two hundred or three hundred yards distant from appellant's house. He claims that the object of his mission was to demand an explanation of the conduct of deceased, and to see what reparation he proposed to make for his treatment of his daughter. On his arrival at Ward's home, he was told that deceased was not in, as he was out squirrel hunting. Appellant retired, but returned a few hours afterwards, and was then informed that deceased was there. He asked for him to come out to see him, and the state's witnesses

all say that deceased sent him word that he did not like to come out on a man with a gun. Appellant responded by saying that he meant no harm by carrying his gun, and that he did not intend to hurt him. Appellant started in the house, and did walk into the hall of the house, and as he got opposite or near to the door of the room in which deceased was, he (deceased) stepped out of the door unarmed to see appellant, and at that moment appellant instantly fired upon deceased with a Winchester rifle, but failed to hit him. Thereupon deceased grabbed the barrel of the gun, and each began to scuffle for it. While in this deadly struggle for the gun, appellant pulls a pistol from his pocket, still holding onto the gun, and fires two or three shots into the body of deceased. At that moment, deceased released his hold upon the gun, and staggered back, and fell from the hall or porch on the ground, apparently dead. Thereupon appellant raised his rifle and fired two shots into the body of the deceased as it lay on the ground. From the beginning to the end of this death struggle, not a word was uttered by either combatant.

Appellant's version of the affair was in substance this: That, when he asked for deceased, Henry Ward replied that "Shoat says he won't come out on a man with a gun;" that he then started in the house, consisting of two rooms and two sheds. The two large rooms were separated by a hall about seven feet wide. As he entered the hall, he did not know in which room deceased was, and that he directed his attention towards the east room, when suddenly the door of the west room was thrown open, and the first he saw of the deceased was when he grabbed appellant's rifle, and the deadly struggle for the weapon began. The record shows that both were about equal in strength, and it is claimed that Will Henry had been afflicted with rheumatism for several months, and had just recently discarded his crutches. He claims that the gun was discharged in the scuffle, the ball passing

through the door ranging downward through the floor. Appellant claims that they continued to struggle, each seeking possession of the gun, and that the gun was for the second time discharged, and that this shot struck Pointelle. He states about this time both fell from the porch, and that deceased released his grip on the gun, and then turned around, and then again advanced upon appellant with hands outstretched as if to seize him or the gun. Appellant claims that he then fired upon deceased and he fell dead. He further alleges that there were three shots fired, and that he did not fire into the body of deceased as it lay upon the ground. He bitterly denies having a pistol in his possession during the difficulty. Appellant further testified that his daughter had told him a short time prior to the shooting that "Shoat told her he would kill her if she said anything about it, and if I said anything to him about it he would kill me, too." Mose Faulkner testified that deceased said to him, in the presence of his wife, if he (Will Henry) ever fooled with him, "I am going to kill him." Annie Faulkner testified that three or four days before Christmas Pointelle said to her: "If Will Henry ever fooled with him, he was going to kill him." All of these statements were excluded by the court upon the objection of the state, and over the protest of defendant.

The foregoing is a brief abstract of the facts as contained in the record.

Appellant complains that the court committed error in refusing instruction No. 1. There is a slight error in this instruction; but upon an inspection of instruction No. 15, given the defendant, we are of the opinion that the principle of law sought to be invoked by instruction No. 1 was fairly stated in this instruction No. 15, given the defendant, which says: "That if the jury believe from the evidence that the defendant went to the house of Harry Ward to see Pointelle Echols about his daughter, and carried with him his Winchester rifle, and that

he started into the room where Pointelle was on a peaceful mission, and that Pointelle, when he was in no danger at the hands of defendant, real or apparent, sprang out and grabbed the rifle, and that said Pointelle attempted to wrench the rifle from defendant, and that defendant reasonably believed that he was in danger of suffering death or great bodily harm at the hands of the deceased, and drew his pistol and shot deceased while they were struggling over the rifle, and that Pointelle fell dead from the pistol shots, and after he was dead defendant shot him twice with his rifle, then the jury will find defendant not guilty."

We will make this further observation. While it is true no man has any right to take the law into his own hands to avenge supposed or real grievances inflicted upon him or any member of his family, yet appellant did not violate this wise principle of law, if he, after learning of the deplorable condition of his daughter, inflicted upon her by the deceased, speedily sought deceased for an explanation and for a peaceful adjustment of the matter; and in seeking this end he had the further right, with the lights before him, to arm himself, not with the intention to provoke a difficulty, but to protect himself, if necessary, in self-defense. The vital question was whether the interview was sought with the deliberate purpose of provoking a difficulty, or was the interview sought in a friendly spirit to adjust the matter in some amicable way. If appellant, in attempting to adjust this matter, approached the deceased in the spirit as above indicated, and deceased, without any provocation on defendant's part, attacked appellant, by suddenly seizing his rifle, when appellant was not attempting to use same, and deceased attempted to wrench same from him, and he, appellant, reasonably believed that he was in real or apparent danger of his life or great bodily harm at the hands of deceased, killed him, he cannot be held, under such circumstances, guilty of murder. The Court of

Criminal Appeals of Texas, in two well-considered cases, has maintained this principle. *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17; *Melton v. State*, 47 Tex. Cr. R. 451, 83 S. W. 823. See, also, *Patterson v. State*, 75 Miss. 670, 23 South. 647.

Appellant further complains that the court erred in excluding the threats testified to in this case, and also of the refusal of instruction No. 2, which is as follows: "In determining who was the aggressor in the fatal difficulty, and in determining whether deceased intended to use the rifle against defendant if he had secured the same, if they believed he attempted to secure same at the time of the fatal shots, they may take into consideration, together with all the evidence in the case, any threats which the evidence shows were made against defendant, whether such threats were communicated to him or not. And in passing on the conduct of defendant, as to whether or not he reasonably apprehended an attack from deceased with a deadly or dangerous weapon at the time of the fatal shots, the jury will or may take into consideration, together with all the other evidence, any threats which the evidence shows were communicated to the defendant, which were made by deceased against him." In the light of the facts of this case, the court erred in excluding the threats. After the exclusion of the threats, the refusal of this instruction was correct. But if the threats had been admitted, as they should have been, the refusal of the instruction would have been error. This court has held, time and again, that uncommunicated threats are admissible when there is a conflict in the testimony who was the aggressor, where they throw light on the significance of the acts of the deceased. *Sinclair v. State*, 87 Miss. 330, 39 South. 522, 2 L. R. A. (N. S.) 553, 112 Am. St. Rep. 446; *Johnson v. State*, 54 Miss. 430. From the record in this cause, it is manifest there was a conflict in the testimony as to whether defendant or deceased was the aggressor at the

time deceased was killed. These uncommunicated threats were admissible. Some of the authorities, throwing light upon this point in a more or less degree, are *Johnson v. State*, 66 Miss. 192, 5 South. 95; *Wiggins v. Utah*, 93 U. S. 465, 23 L. Ed. 941; *Allison v. U. S.*, 160 U. S. 203, 16 Sup. Ct. 252, 40 L. Ed. 395.

It is contended by the prosecution that all these threats were conditional, and were not admissible. The alleged threats were: "If he speaks to me about it, I will kill him, too." "If he tackles me about it, I will kill him." "If he fools with me, I will kill him." Bear in mind that at the time these threats were made the wrong of the girl had been committed, but the appellant was in ignorance of this; but the deceased knew it too well for his own comfort, and doubtless his guilty conscience often whispered to him, "And be sure your sin will find you out." Indeed, the deceased knew all the time that, when "swelling nature" unfolded this wrong, as it must, that the father would say "something to him about it." He at once sought the perpetrator of the deed, with intent, according to his testimony, to adjust the unfortunate affair in some amicable way, perhaps hoping that the wrongdoer might make reparation by marrying the girl he had wronged. Be this as it may, he had a right "to speak to him about it" in the spirit and on the lines heretofore indicated. On the morning of the fatal difficulty appellant did then and there attempt "to speak to him about it." The condition of the alleged threats of deceased had materialized, and, if appellant's testimony is true, deceased did then and there attempt to make good his threats by an immediate attack upon him. These threats were admissible, to throw light on the significance of the acts of the deceased, and to further aid the jury in determining who was the aggressor. It was the exclusive province of the jury to say, with this testimony in and this instruction given, what credit, if

any, they would give to the defendant's evidence and to his theory of the case.

For the error in excluding the threats, we think this case should be reversed and remanded.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court; and, for the reasons therein indicated by the commissioner, the case is reversed and remanded.

NATCHEZ & SOUTHERN R. R. CO. v. JOHN E. CRAWFORD.

[55 South. 596.]

1. JURY. *Constitutional law. Acts 1910, chapter 135. Presumptions. Constitution 1890, article 6.*

A statute cannot confer judicial power upon a jury, as to do so would be violative of article 6 of the Constitution of 1890, under which all judicial power in the state is vested in the supreme court, and the circuit and chancery courts and the courts of justices of the peace and such other inferior courts as the legislature may from time to time establish.

2. CONSTITUTIONALITY OF A STATUTE. *Duty of court.*

All doubts are resolved in favor of the constitutionality of a statute; if there is any reasonable doubt of its constitutionality, it must be upheld by the court.

3. ACTS 1910, CHAPTER 135.

Section 2 of chapter 135, acts 1910, declaring that "questions of negligence and contributory negligence shall be for the jury to determine" is merely declaratory of the common law. There can be no question of negligence or contributory negligence for the jury, except issue of fact. The court alone has the power to determine the legal sufficiency as tending to establish negligence or contributory negli-

gence. If the negligence never reaches the point of raising issue of fact to be determined, then there is no question for the jury, and the court should instruct peremptorily.

4. SAME.

The only change made in the common law by this statute is that in the class of actions referred to in section 1, contributory negligence on the part of the plaintiff is no longer a bar to recovery, but may be used against him by the defendant in mitigation of damages.

5. CONSTITUTIONALITY OF STATUTE. *Parties who can question.*

The court will not listen to an objection made to the constitutionality of a statute by a party whose rights are not affected thereby, and who has no interest in establishing its invalidity.

6. CONSTITUTIONAL LAW. *Equal protection. Classification.*

Acts of 1910, chapter 135, providing that in actions for personal injuries, contributory negligence shall not bar a recovery, but that damages shall be diminished in proportion to the amount of contributory negligence, violates neither the due process nor the equal protection clauses of the Constitution of the United States. It is within the police power of the state; it makes a classification of all actions for personal injuries and this classification is based on reason and justice and is not a discrimination in favor of defendants in other character of actions.

APPEAL from the circuit court of Adams county.

HON. M. H. WILKINSON, Judge.

Suits by John E. Crawford against the Natchez & Southern Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Ratcliff & Truly, for appellant.

We contend, first, that this statute is violative of the fourteenth amendment of the Constitution of the United States for two reasons:

(a) That it deprives a citizen of his property without due process of law.

(b) It denies the defendants in damage suits for personal injuries or death from personal injuries the equal protection of the law.

In terms it makes the defendant liable in damages whether guilty of any negligence or not. And this, too, without regard to how reckless the plaintiff may have been, and absolutely authorizes a jury to return a verdict in damages against a defendant without regard to whether the defendant has been guilty of negligence or not; and thereby authorizes the taking of the property of defendant without the process of law. It denies to the defendant the equal protection of the law as given to the plaintiff, and discriminates against the defendant in favor of the plaintiff, in that, it authorizes the jury to punish defendant by an award of damages for any kind of negligence, even slight, and rewards the plaintiff by a verdict for damages in his favor when he is guilty of the same thing, or of much worse, even gross negligence.

Under this statute the defendant may be guilty of only the slightest negligence and the plaintiff may be guilty of the grossest recklessness. Yet the jury are required to punish the defendant by a verdict for damages against it for its slight negligence, and to reward the plaintiff by a verdict for damages in his favor for his gross negligence. As said by this honorable court in the case of the *Yazoo & Mississippi Valley Railroad Company v. Wallace*, 90 Miss. 609:

“It is a statute for the benefit of plaintiffs” and “it works only against the defendant litigant.”

The statute undertakes to abolish all difference in degrees of negligence; and it is well recognized principle of law that there are three degrees of negligence: Slight, ordinary and gross. And while the defendant is held liable by said statute for the slightest negligence, the plaintiff is authorized to recover even though guilty of the grossest negligence.

We will illustrate this proposition by reference to the recent case of *Railroad Company v. Ruff*, 95 Miss. 165. In this case the plaintiff was on a straight stretch of

railroad track, meeting a train, and notwithstanding the signals of the train's approach had been given within the range of his hearing, he failed to look ahead until the head light of the engine was seen by its reflection on the track, and then he needlessly remained on the ends of the cross-ties until he was struck by the locomotive. The train was running through an incorporated village at an unlawful rate of speed. In this the company was negligent and acting in violation of a statute. If that case had been tried under this statute, and if the statute is valid, the plaintiff would undoubtedly, by virtue of this statute, have been entitled to a verdict, notwithstanding the gross recklessness of his own conduct. There the defendant was only slightly negligent and the plaintiff was guilty of the grossest recklessness. But the court held in that case that as a matter of law the plaintiff could not recover; but under the statute now under discussion the jury would necessarily have been instructed by the judge in such case that his negligence would not debar him from recovery, but that on account of the slight negligence of the defendant in running its trains at a too rapid rate of speed through a municipality, that they should find for the plaintiff a verdict in damages diminished by what they might think the proportionate amount of negligence should be attributed to him.

It compels the judge to instruct the jury in all cases where there is the slightest negligence in evidence on the part of the defendant or even where there is none to give a verdict against the defendant without regard to the conduct of the plaintiff, however reckless it may have been. And in this it plainly invades both the constitutional power of the judiciary and the constitutional rights of citizens; and it is also an invasion of the right of trial by jury.

The question of contributory negligence of the plaintiff is frequently purely a matter of law, as was held in

the Ruff case above cited. But this statute now under consideration denies the power of the judge to state to the jury what is the law. But on the other hand compels him to instruct the jury that in such case they must find a verdict for the plaintiff, but may diminish it, etc. It invades the right of trial by jury because it prohibits the jury from returning a verdict for the defendant without regard to what they may think of plaintiff's conduct, and although they may believe that the plaintiff was grossly negligent and was the proximate cause of his own hurt. It may happen that it is the unanimous opinion of the jury that the plaintiff's recklessness was the cause of his own injury and that in truth and in fact by reason of his conduct he is not entitled to recover, yet they are met by the positive instruction of the court, which he is compelled by this statute to give, that such conduct does not bar a recovery, and that they must find a verdict against the defendant, only to be diminished, etc.

In the case of *Oakes v. State*, — So. Rep., p. 79, vol. 54, advance sheet No. 2, which was a libel case, the court construed that part of section 13 of the constitution, which provides that in the trial of a libel case the jury should determine the law and facts under the direction of the court as not to interfere with the inherent power of the court to direct the jury as to the law and points out the utter confusion which would follow if juries were left to determine the law. The act in question clearly attempts to deprive the judge of this right and compels him to submit questions of law to the determination of the jury and thereby invades and modifies or annuls the inherent and constitutional power of the judge.

Section 1 of the act seeks to establish liability in all cases of the character mentioned therein, and particularly requires a jury to award damages against all defendants in such cases. There are no qualifying words in this statute to the effect that these damages should

be diminished only in cases when a verdict would be returned by the jury on their finding on the facts that the defendant was guilty of negligence, or that plaintiff had a right of action, or in "proper cases." No reference whatever is made to the primary proposition that in order to recover the plaintiff must show and the jury must believe that the defendant was guilty of negligence or some wrongful act of commission or omission.

Second, it violates sections 14 and 31 of the Constitution of the state of Mississippi for reasons above given.

It also violates section 193 of the Constitution of the state of Mississippi, because it is universal in character. It confers the exceptional rights upon all plaintiffs, without exception, in suits for damages for personal injuries or death arising therefrom, and burdens all defendants in such suits with its discriminations against them. It makes no exception as to conductors or engineers in charge of dangerous and unsafe cars or engines voluntarily operated by them, as provided in section 193 of the Constitution, and section 4056, Code, 1906; and if this statute is not unconstitutional, a conductor or engineer in charge of dangerous and unsafe cars or engines voluntarily operated by them, may recover under it, and it abolishes the constitutional defense provided in section 193 and Code section 4056 to actions brought by conductors or engineers, that they were voluntarily operating dangerous and unsafe cars or engines.

To illustrate this point, we will take the case of *Yazoo & Mississippi Valley Railroad Company v. Woodruff*, decided last November and reported in 53 South. Rep., page 687, which was tried before the enactment of the statute now under consideration. In that case Woodruff was an engineer voluntarily operating an engine with knowledge of its defects; and it was held in that case that he was barred of recovery by reason of the exception in section 193 of the Constitution.

We understand that section of the Constitution provides that knowledge by an employee of the defective or unsafe character or condition of any machinery, ways or appliances shall be no defense to an action for an injury caused thereby, but that as to conductors and engineers the voluntary operation of such unsafe cars or engines by them is a defense to suits brought by them. So that, if the Woodruff case, above cited, had been tried under this statute now under consideration, he could have recovered, because this statute abolishes the constitutional defense above referred to.

Third, this statute is absolutely contradictory in its terms.

The first section thereof provides that in all cases hereafter brought for personal injuries, etc., contributory negligence shall not be a bar to recovery and its provisions are mandatory and peremptory.

And yet section 2 of the act provides that all questions of negligence and contributory negligence shall be for the jury to determine. Then, if the jury should determine that the contributory negligence of the plaintiff was the proximate cause of the injury they should find in such case a verdict for the defendant. And if this section 2 has any meaning at all, that is what it means. But nevertheless, though the jury may be of the opinion that the contributory negligence of the plaintiff, which is required by section 2 to be submitted to them, was the cause of the injury, yet by the first section of the act they are prohibited from finding a verdict in favor of the defendant, but must find a verdict in favor of the plaintiff, but may diminish it some, on account of the plaintiff's negligence.

We beg to call the attention of the court in this connection that this statute cannot be severed, and part of it held constitutional and part not. It is an entirety. And all of it must stand or all of it fall. And to attempt to make a severance and hold part of the statute

constitutional would simply be judicial legislation and amending the statute and inserting new matter by judicial construction, which, of course, cannot be done.

This principle was enunciated in *Ballard v. Oil Company*, 81 Miss. 507. The statute is crudely drawn and violates every principle of equity and justice, as well as the Constitution of the United States and the state of Mississippi, and we earnestly and respectfully contend that it should be so held by this honorable court.

Engle & Darden and Potter & Hindman, for appellee.

This case involves the constitutionality of chapter 135 of the laws of Mississippi, 1910. This statute is only applicable where the defendant and the plaintiff are concurrently guilty of negligence causing the injury. The defendant's negligence must be the proximate cause of the injury, but the fact that the plaintiff's negligence directly contributed to the injury as an efficient cause, will not bar a recovery, will only diminish the damages. Under this statute, if there are no facts showing or tending to show the defendant guilty of negligence causing the injury, the defendant is entitled to a peremptory instruction. The law in respect to defendant's negligence is not changed.

The power of the judge to pass on negligence as a matter of law and to determine whether there is sufficient evidence of negligence on the part of the defendant to go to the jury remains unchanged. Section 2 of the act, "All questions of negligence and contributory negligence shall be for the jury to determine," means all questions of "fact." Juries are common-law juries, and of course questions in this connection mean such questions as common-law juries have always passed on—questions of fact; in other words, section 2 is but declaratory of the common law.

In *Keeley v. Chicago, M. & St. P. Ry. Co.*, 119 N. W. 309, the supreme court of Wisconsin in construing a statute of similar provisions, says:

“Did the legislature intend by the provisions of subdivision 5 of this act to confer judicial power vested in the court on the jury? In all cases under this act, the question of negligence and contributory negligence shall be for the jury. In their general sense the words are but a declaration of the law as it exists, namely, that when the court has found that there is legal evidence tending to show negligence or contributory negligence, it is for the jury to determine from the evidence adduced whether negligence or contributory negligence exists. This interpretation of the law does not make a change in the law and cannot affect the rights of any person. It is however asserted that if the phraseology of this provision be considered in connection with other parts of the law which pertain to the duties of the jury in these cases and the general purpose and object of the act, it is apparent that the legislature intended to confer on juries the judicial power to determine the legal sufficiency of the evidence offered as tending to establish negligence or contributory negligence in the case. If, however, it be assumed that the legislature intended to confer judicial power on juries such as we have shown is inhibited by the Constitution and such as would render this subdivision void; still this view of the subdivision does not necessarily render the whole act void, for we are persuaded that such invalid part cannot affect the validity of the other parts of the law.

The provision of the Constitution relating to trial by jury in suits at common law apply to the territories of the United States. *Webster v. Reid*, 11 How. 461; *Callan v. Wilson*, 127 U. S. 541; *American Pub. Co. v. Fisher*, 166 U. S. 464; *Springville v. Thomas*, 106 U. S. 707; *Rasmussen v. U. S.*, 197 U. S. 516.

Although it is well established that the provisions of the Constitution of the United States are applicable to the territories with reference to jury trials, the Supreme Court of the United States held the United States Em-

ployers' Liability Act of 1906 constitutional as to the employees of railroads in the territories, and that act contains the provision that "all questions of negligence and contributory negligence shall be for the jury to determine." *El Paso Ry. Co. v. Gulierrez*, 215 U. S. 87; *M. O. & P. Ry. Co. v. Castle* (C. C. A.), 172 Fed. 841.

The only change the statute accomplishes is to make contributory negligence an element in computing the damages and not a defense in bar, just as pain and mental and physical anguish have always been elements in computing damages. The defendant is not punished by this statute in cases of slight negligence. Where the negligence is slight, the recovery must be small in proportion; just as the recovery for a scratch or bruise must necessarily be small. The principle is the same, and under the statute contributory negligence is merely an element in computing the damages. It is true, a case can never be taken away from the jury on the grounds of contributory negligence under the provision of this act, for the simple reason that contributory negligence is no longer a legal defense in bar of a suit. The statute does not deny to the court the power to state the law of contributory negligence, but contributory negligence, as said above, becomes merely an element in the computation of damages. The defendant is only made to suffer for his own wrong, his own share of the blame. There is still secured to him a fair and orderly trial; the judge determines all questions of law, and the jury, under proper instructions, the questions of fact, and we urge that there is no ground for the contention that the statute "deprives a citizen of his property without due process of law." *Jones v. Ry.*, 72 Miss. 22; *Jones v. Ry.*, 73 Miss. 110.

But it is said that the statute denies defendants, in damage suits for personal injuries and death, the equal protection of the law. As the statute is general and applies to every person in the state, it must be conceded

it applies alike to everyone similarly situated. What distinction and classification is made? The rule of contributory negligence is changed as to persons and not as to things. The classification is persons and things. We urge that there could be no more natural classification, and that the passage of this act was a reasonable exercise of the police power.

Surely this court will not hold a state statute violative of any provision of the Constitution of the United States, unless such statute is clearly unconstitutional. If a court entertains a doubt as to the unconstitutionality of a statute, the doubt is to be resolved in favor of the constitutionality of the statute. This is true even where only the state constitution is said to be violated. The case of the *State v. L. & N. Railroad Company*, involving the constitutionality of the statute of 1908 to prevent the removal of causes from the state to the federal court, is a very close case on the question of its constitutionality, but the court decided the case very properly in favor of the constitutionality. Whenever a supreme court of a state decides that a state statute is in conflict with the federal Constitution where there is any doubt of the unconstitutionality of such statute, there is a voluntary surrender of just that much state sovereignty, and the state government is rendered that much weaker and more impotent. Unless a statute is clearly in conflict with the federal Constitution, we believe this court will uphold the validity of the act in that respect. And we insist that were the burden otherwise, were the burden on the appellee to show that this statute does not conflict with the federal Constitution, the burden has been well met. The federal statute, the Employers' Liability Act of 1906, from which this statute is practically copied, is applicable to the employees of a railroad, and contributory negligence is a defense except where the negligence of the defendant is great and the contributory negligence of the plaintiff is small in

comparison. Otherwise the federal statute is identical with the present statute. The federal statute, including the clause, "All questions of negligence and contributory negligence shall be for the jury to determine," has been upheld by the Supreme Court of the United States in the case of *El Paso R. R. Co. v. Gutierrez*, 215 U. S. 87, cited above. And we know no reason why the state should be denied the power to abolish contributory negligence as a matter of defense, and make it an element in computing the damages instead.

It is contended, however, that this statute violates section 193 of the Constitution of Mississippi, because it makes no exception as to conductors or engineers in charge of dangerous and unsafe cars or engines voluntarily operated by them, as provided in section 193 of the Constitution, and section 4056, Code 1906. This position is untenable. The act is not in conflict with section 193 of the Constitution. Knowledge as a defense is based on the doctrine of the assumption of risks, rather than the doctrine of contributory negligence.

The recovery of this plaintiff is not based alone on the statute repealing the doctrine of contributory negligence, but he could not recover, notwithstanding the statute, had he known of the defects in the coupler, except for section 193 of the Constitution of 1890, for the court would hold that he had assumed the risk. An engineer knowing that cars and machinery voluntarily operated by him were dangerous and unsafe, could not recover under the statute, because he would be precluded by the common law doctrine of the assumption of risks. Section 193 repeals the doctrine of assumption of risks, based on knowledge of the employee, as to other employees of railroads, except conductors and engineers, and preserves the doctrine in respect to engineers and conductors for the sake of public policy. But section 193 does not legislate with reference to the doctrine of contributory negligence, and the doctrine of contributory

negligence, being a common-law doctrine, is a legitimate subject of legislation. But even if the exception as to conductors and engineers was predicated on the doctrine of contributory negligence (and it is not), the courts would construe the section of the Constitution together with the statute, and give force to the statute except in this particular. The intention of the legislature was undoubtedly to give as much relief in this direction as possible, and without hesitation the court can declare that the legislature would have passed this law regardless of the necessary exemption on its operation against conductors and engineers.

Argued orally by *E. H. Ratcliff*, for appellant.

ANDERSON, J., delivered the opinion of the court.

The appellee, John E. Crawford, sued the appellant, Natchez & Southern Railroad Company, in the circuit court of Adams county, and recovered a judgment for two thousand dollars, from which appellant prosecutes this appeal.

The appellee was a brakeman in the employ of the appellant, and while engaged about his duties as such, in attempting to make a coupling, had his foot crushed, which had to be amputated. Appellee alleged in his declaration, and his proof tended to establish, these facts (quoting from the declaration): "That on said date defendant, disregarding its duty, negligently and carelessly permitted to be in the train on which plaintiff was engaged to perform services as such brakeman, a switch engine tender having an insecure, unsafe, and defective coupling appliance, having an insecure, unsafe, and defective drawhead, in this: That the said coupling appliance was not arranged with retaining springs on the side or collar, and the drawhead was so improperly fastened as to cause it to work to one side or the other of the cuff or casting during the running of the switch en-

gine, and worked stiff and jerky, and had too large a radius of play; all of which facts were known, or by the use of ordinary care and prudence might have been known, to defendant, the said drawhead and cuff or casting having been in that condition for a long period of time; and that the plaintiff, while at the place on said switch engine tender which his duty as such brakeman required him to be (the footboard at the rear of said switch engine tender), on the afternoon of said July 23, 1910, in the Natchez yards of defendant, and while then and there in the careful performance of his duty in attempting to push said defective, insecure, and unsafe drawhead into place, by standing on said footboard with his right leg, holding onto said switch engine tender with his two hands, and shoving said drawhead with his left foot, the said drawhead being so stiff and hard to move, and having worked so far to one side of the cuff or casting, that it could not be moved by the strength of his hand, and then and there, because of the insecure, unsafe, and defective condition of said drawhead, and the defective condition of said cuff or casting, the said drawhead went too far to the other side of said cuff or casting, and in consequence the left foot of plaintiff was caught between the cuff or casting on the rear of the switch engine and the cuff or casting on the flat car, with which a coupling was being made or attempted, then and there breaking, crushing, and mangling it to such an extent as to render its amputation necessary to save his life, which was done."

The pleadings and instructions given and refused present the questions of the construction of chapter 135, p. 125, acts 1910, and of its constitutionality. The statute is as follows:

"Section 1. Be it enacted by the legislature of the state of Mississippi, in all actions hereafter brought for personal injuries, or where such injuries have resulted in death, the fact that the person injured may have been

guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured.

“Sec. 2. All questions of negligence and contributory negligence shall be for the jury to determine.”

The giving of instructions Nos. 1 and 4, for the appellee, is assigned as error. They are:

(1) “That if they believe from the evidence in this case that the plaintiff, at the time of the injury complained of, was in the employ of the defendant as brakeman or switchman, and was engaged in making a coupling of the engine tender used by the defendant with one of the defendant’s ‘tail’ cars or ‘toe’ cars, and that then and there the plaintiff was injured because of the coupling, which was defective or unsafe or insecure, and that this condition of the coupling, if shown, was known to the defendant, or by the use of ordinary care and prudence ought to have been known to defendant, then the jury should find a verdict in favor of the plaintiff; and the fact that the plaintiff may have been guilty of contributory negligence in using his foot in and about this work is, under the law, no bar to his recovering a verdict against the defendant, but will call for the damages which the jury may believe from the evidence he has sustained, to be diminished in proportion to the amount of negligence attributed to him.”

(4) “That if they find for the plaintiff, they should award him damages sufficient to compensate him in full for the injury, if any, as shown by the evidence to have been sustained by him; also for the pain and suffering, if any, shown by the evidence to have been endured by him in consequence of the injury; also for the loss of time and loss of earning capacity, if any, shown by the evidence to have been sustained by him on account of the injury; and also to compensate the plaintiff in full for the permanent damage, if any, as shown by the evi-

dence to have been sustained by him in consequence of the injury: Provided, however, that if the jury believe from the evidence that the plaintiff in his conduct has been guilty of contributory negligence, then the sum total of the damages he would otherwise be entitled to shall be diminished in proportion of the amount of negligence attributable to him."

And the refusal by the court of instructions Nos. 1 and 2, for the appellant, is assigned as error, which instructions are as follows:

(1) "The court instructs the jury that if they believe that the plaintiff's own negligence caused or contributed to his injury, then they must find for the defendant."

(2) "The court instructs the jury that even though they may believe from the evidence that defendant, on the occasion in question, was guilty of negligence, still if they further believe that plaintiff was guilty of a greater degree of negligence, then they must find for the defendant."

The court gave instructions Nos. 5, 6, 7, 8, and 9, for the appellant, which are here set out for the purpose of more fully presenting the issues of law involved:

(5) "The court instructs the jury, for the defendant, that it is a perfect defense to this to show that the couplers, machinery, and appliances with which plaintiff's duties required him to work were in good order, of standard patterns, and the engine properly handled, and the other employees of defendant were not negligent, and if the jury believe that the evidence in this case establishes these facts, then it is the sworn duty of the jury to find a verdict for the defendant."

(6) "The court instructs the jury, for the defendant, that, although they may believe that the injury to plaintiff was caused by the running of the locomotive of defendant, yet the defendant has established a perfect defense if it had shown that its couplings, machinery, and

appliances were in good order and repair, and were properly handled and without negligence on the part of its other employees, and if the jury believe that this has been established, then it is their sworn duty to find a verdict for the defendant."

(7) "The court instructs the jury that, if they believe from the evidence that the accident in question was caused solely by the negligence of the plaintiff, then they must find for the defendant."

(8) "The court instructs the jury that if they believe from the evidence that plaintiff, on the occasion in question, was reckless and grossly negligent, then they must find for the defendant; and this is true even though they may further believe that the coupler upon the engine was defective, or broken, or not automatic."

(9) "The court instructs the jury that if they believe from the evidence that the coupler in question was of a standard make automatic coupler, and was not defective or out of repair, and that the agents of defendant were guilty of no negligence at the time of the accident, then they must find for the defendant."

It is argued on behalf of appellant that the statute in question confers judicial power on the jury, and for this reason is unconstitutional. It will be noted that section 2 of the act provides that "all questions of negligence and contributory negligence shall be for the jury to determine." If that were the proper construction of the statute (that it confers such power), it would undoubtedly be violative of the Constitution; for by article 6 of the Constitution of 1890 all judicial power in the state is vested in the supreme court and the circuit and chancery courts and the courts of the justices of the peace, and in such other inferior courts as the legislature from time to time may establish. And the common-law jury, guaranteed by section 31, is a jury with power alone to try issues of fact, and not of law. It is clearly not within the legislative competence, under these provisions of

the Constitution, to invest juries with judicial power—that is, power to determine issues of law.

Does the statute, properly interpreted, confer judicial power on the juries? In answering this question, it is well to have in mind certain well-recognized rules for the determination of the constitutionality of statutes. The question whether a statute is violative of the Constitution is one of much delicacy, and which the court should approach with great caution and deliberation. Its constitutionality is *prima facie* presumed, because the legislature, in adopting it, is first required to determine its constitutionality. The legislature must be deemed to have acted with integrity, and with a just desire to keep within constitutional limitations. The legislature is a co-ordinate branch of the government with the judiciary, invested with high and responsible duties, and legislates under the solemnity of an oath, which they are not supposed to disregard.

All doubts are resolved in favor of the constitutionality of the statute. If there is reasonable doubt of its constitutionality, it must be upheld by the courts. If it is susceptible of two interpretations, one in favor of its constitutionality and the other against, it is the duty of the courts to uphold it. Cooley's Constitutional Limitations (7th Ed.), pp. 252, 253, and 254.

A statute of Wisconsin (Laws 1907, c. 254, section 1816, subd. 5) provides: "In all cases under this act, the question of negligence and contributory negligence shall be for the jury." (It will be noted section 2 of the statute under consideration is in substantially the same terms.) The supreme court of Wisconsin, in passing on the constitutionality of that statute, in *Kiley v. Chicago, M. & St. P. Ry. Co.*, 138 Wis. 215, 119 N. W. 309, said: "It is contended that the legislature intended to deprive the courts of their judicial functions, as conferred on them by section 2, art. 7, of the state Constitution, by the provisions of subdivision 5, and to confer such functions

on juries, as they are constituted by the state Constitution. The powers conferred on courts and juries by these constitutional provisions were well defined in the established system of jurisprudence in this country at the time of their adoption. This court interpreted these constitutional provisions as conferring on court and jury those well-defined powers as they existed, and had been repeatedly exercised by court and jury, under the common law. In *Callahan v. Judd*, 23 Wis. 343, in speaking of the significance of the phrase 'judicial power as to matters of law and equity,' employed in the Constitution, as applied to the courts, the court declares: 'In actions at law they had the power of determining questions of law, and were required to submit questions of fact to a jury. When the Constitution, therefore, vested in certain courts judicial power in matters of law, this would be construed as vesting such power as the courts, under the English and American system of jurisprudence, had always exercised in that class of actions. It would not import that they were to decide questions of fact, because such was not the judicial power in such actions. And the Constitution does not attempt to define judicial power in these matters, but speaks of it as a thing existing and understood.' See, also, *Oatman v. Bond*, 15 Wis. 21; *Klein v. Valerius*, 87 Wis. 54, 57 N. W. 1112, 22 L. R. A. 609; *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808, 20 Am. St. Rep. 123. Under the system of law as it then existed, it devolves on the court to determine the legal sufficiency of the evidence tending to prove a fact, and, when the court had judicially ascertained that the evidence adduced tended to establish the constituent facts of the matter at issue, it then devolved on the jury to determine whether, upon the evidence, the fact was satisfactorily proven. The powers of the court and jury in the administration of the law in these respects were distinct and well-defined at the time of the adoption of our Constitution, and became

vested in the court and jury by its provisions. They cannot be abrogated or modified by legislative action (to the extent of impairing, in any degree, the judicial power). Under the Constitution courts have become vested with the judicial power to determine the questions of the legal sufficiency of the evidence to establish the rights of the parties at issue, and to apply the law to the facts when found, and this power cannot be withdrawn from them and conferred on juries. Did the legislature intend by the provisions of subdivision 5 of this act to confer judicial power, vested in the court, on the jury? It declares: 'In all cases under this act the question of the negligence and contributory negligence shall be for the jury.' In their general sense the words are but a declaration of the law as it exists, namely, that, when the court has found that there is legal evidence tending to show negligence or contributory negligence, it is for the jury to determine from the evidence adduced whether negligence or contributory negligence exists. This interpretation of the provision does not make a change in the law, and cannot affect the rights of any person."

The circuit court of appeals for the eighth circuit, in *Mo. Pac. R. R. Co. v. Castle*, 172 Fed. 841, 97 C. C. A. 124, having under consideration a statute of Nebraska providing, "All questions of negligence and contributory negligence shall be for the jury," said: "In view of the history of trial by jury and the distribution of governmental powers by the Constitution of Nebraska, we cannot presume for a moment that the legislature had reference to any question except those of fact, when it used the language: 'All questions of negligence and contributory negligence shall be for the jury.' As thus interpreted the language quoted is simply declaratory of existing law. *Kiley v. Chicago, M. & St. P. Ry. Co.* (1909), 138 Wis. 215, 119 N. W. 309, 120 N. W. 756. It is only when in the opinion of the court there is no question of

negligence or contributory negligence as a matter of fact that cases are taken from the jury, under existing practice. . . . If the legislature has the power to take away the defense that the injury sued for was committed by fellow servants, it certainly has the right to modify the rule that any negligence of a plaintiff directly contributing to his injury will defeat his recovery. *Mo. Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Minneapolis & St. Louis Ry. Co. v. Her- rick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; *Tullis v. Ry. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; *Pierce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705; *Kiley v. Chicago, M. & St. P. Ry. Co.*, 138 Wis. 215, 119 N. W. 309, 120 N. W. 756."

Section 2 of the statute, declaring that "questions of negligence and contributory negligence shall be for the jury to determine," is merely declaratory of the common law. There can be no questions of negligence or contributory negligence for the jury, except issues of fact. The court has the power, which cannot be taken from it, to determine the legal sufficiency of the evidence as tending to establish negligence or contributory negligence. The language, "all questions," means questions of fact—issues of fact—are for the jury. If the evidence never reaches the point of raising issues of fact to be determined, then there is no question for the jury. This section has reference to the issues of fact to be submitted to the jury, under the provisions of section 1 of the act. The only change made in the common law by this statute is that in the class of actions referred to in section 1 contributory negligence on the part of the plaintiff is no longer a bar to recovery, but may only be used against him by the defendant in mitigation of damages. If the testimony of the plaintiff falls short of establishing negligence on the part of the defendant, there is no

question of negligence for the jury to determine, and the court may direct a verdict for the defendant. On the other hand, if there is sufficient evidence to go to the jury on the question of defendant's negligence, and there is no testimony tending to establish contributory negligence on the part of the plaintiff, there would be no question of contributory negligence for the jury, and the court should so instruct them peremptorily. The question whether, under this statute, if the plaintiff's injury were brought about by his own willfulness, recklessness, or gross negligence, it would defeat a recovery by him, notwithstanding the negligence of the defendant is not presented for decision. It will be noticed above that such an instruction was given on behalf of the appellants.

It is argued for appellant that the statute in question is violative of the following clause of section 193 of the Constitution: "Knowledge by any employee injured, of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them." The appellant is not in a position to raise this question. The appellee, at the time of his injury, was not a conductor or engineer "in charge of dangerous or unsafe cars, or engines voluntarily operated by him," and is not seeking in that capacity to invoke the provisions of this statute against the appellant. The court will not listen to an objection made to the constitutionality of a statute by a party whose rights are not affected thereby, and who has no interest in establishing its invalidity. *Cooley's Const. Limitations* (7th Ed.), p. 232; 8 Cyc. 787.

Construing this statute as we have above, there is no merit whatever in the contention that it violates either the due process or the equal protection clauses of the Constitution of the United States. It is clearly within

the police power of the state. The statute makes a classification of all actions for personal injuries. This classification is based on reason and justice, and is not a discrimination in favor of defendants in other character of actions. It was held by this court in *Jones v. A. & V. Ry Co.*, 72 Miss. 22, 16 South. 379, that section 3548, Ann. Code of 1892, prohibited running, walking, or kicking switches within the limits of a municipality, and making railroad companies liable for damages sustained thereby, without regard to the contributory negligence of the person injured was not unconstitutional, but within the legitimate exercise of the police power.

It follows, from these views, that the court below committed no error in the instructions given for the appellee, nor in refusing those requested on the part of the appellant.

There is no merit in the other errors assigned.

Affirmed.

ALBERT BROWN v. STATE.

[55 South. 961.]

1. CRIMINAL LAW. *Hearsay evidence. Admissions by third persons.*

Testimony going to show confessions and admissions on the part of third persons made out of court is not admissible in exculpation of those on trial for crime.

2. EXCLUSION OF TESTIMONY. *Reversible error.*

Where on the trial of a party for murder the court excluded the following question, addressed on cross-examination to one of the two eye witnesses of the tragedy and brother to the deceased; "Wasn't there a crowd of men there, B. H. and several others, that Mr. McN. got together, there and told them they would have to hold the inquest and you were right there, and they couldn't get any testi-

Brief for appellant.

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mony about who did the shooting, and found that he came to his death by an unknown hand?" Held, that the exclusion of this question was not reversible error.

APPEAL from the circuit court of Lee county.

HON. JNO. H. MITCHELL, Judge.

Albert Brown was convicted of manslaughter and appeals.

The facts are fully stated in the opinion of the court.

Clayton, Mitchell & Clayton, Boggan & Leake and C. P. Long, for appellant.

It was error for the court to exclude the testimony of O. T. Trapp, sheriff, and Norbin Jones, chancery clerk of Lee county, to whom Henry Brown had confessed that he was the guilty party and not the appellant. The confession and the testimony of the sheriff is in the record, but was not given in the presence of the jury. It shows that Henry Brown had seen his brother suffer for his wrong as long as he could, and that he voluntarily came to the sheriff and gave himself up as the true culprit. He stated at the time that the appellant was innocent and was not even present at the time of the killing.

The testimony in this case, we submit points equally to the guilt of Henry Brown as to that of the appellant, and this fact makes the action of the court in excluding this testimony grave error, with all the testimony indicating the guilt of Henry Brown to a great extent, then for the court to refuse to permit the appellant to prove to the jury that Henry had not only confessed that he was the guilty party, but had spent several months in jail awaiting the indictment by a grand jury and a conviction by a petit jury, and a death upon the gallows, or a felon's cell in the penitentiary; we submit to refuse this to the defendant as denying him a fair and an impartial trial.

If in this case, the testimony offered was incompetent, then, if Henry Brown had been tried and convicted of

this offense and had been sentenced to death, and while on the gallows had made a confession, and admitted his guilt and completely exonerated the appellant in the matter, then it would have been incompetent for the defense to have proven this confession made under such circumstances, in a trial for his own life on the same charge. This would shock the feelings of a barbarian. Such procedure would not be tolerated even in Italy in the trial of the Camorrat.

Yet some American courts have held this kind of testimony incompetent. But when the cases are carefully considered, it will be found, in almost all of them, that the presence of the party making the confession was unaccounted for. This will be found to be true in the following cases in which the confession was excluded, to-wit: *Welsh v. State* (Ala.), 11 So. Rep. 560; *Lowery v. State* (Ga.), 28 S. E. 419; *State v. Young* (La.), 31 So. Rep. 993; *Farrell v. Watz* (Mass.), 35 N. E. 783; *Smith v. State*, 9 Ala. 995.

In the last case cited, Mr. Justice Goldwaite delivered a dissenting opinion in which he said, "When the other facts and circumstances connect the party with the act, and the confession is made under circumstances which repel the suspicion of any motive, I can see no reason why a doubtful crime may not thus be fixed on the confessing party, though the fact of that confession may tend to exculpate another, to whom the circumstances equally point as the guilty person." *Smith v. State*, 9 Ala. 995.

This case is very much like the case at bar, in that the circumstances point to the guilt of either party equally.

In the case of *Coleman v. Frazier*, 4 Rich. L. 152, Oneal Justice, said: "The admission of such testimony arises from necessity, and the certainty that it is true from the want of motive to falsify. . . . Here we have every guaranty of its truthfulness, the grave consequences of

infamy, and at the least ten years' imprisonment would certainly insure the truth of the speaker."

This is the true reason given for this exception to the hearsay rule. It is a statement made against the interest of the party making the confession, and Mr. Wigmore in his second volume on evidence, demonstrates that there should be no difference in receiving such confessions when it would subject the party to a criminal prosecution, than when the admission would affect his property rights. Wigmore's Evidence, vol. 2, section 1476.

Here also will be found a history of this exception to the hearsay rule, and it will be noted that until 1844 in England, such confessions were always admitted. And that this doctrine was not changed until a case was tried in the House of Lords, which Mr. Wigmore says was not well argued or considered by the judges, and in which "a backward step was taken and an arbitrary limit put upon the rule." It was there held to apply only to statements made against the property interest of the party making it. This case has been followed by some of the courts and without reason as Mr. Wigmore clearly shows.

The case of *Martin v. State*, 26 S. W. Rep. 400 (Tex.), refused to follow this precedent and admitted the confession.

It is true that there are not many cases in which this point has been decided because it is seldom that such facts exist in a case. It is a question of first impression in this court.

Geo. T. Mitchell, for appellee.

While there are five assignments of error in the record, counsel, in their brief, have practically abandoned all of same except the third assignment of error, which is as follows:

“Because the court erred in excluding the testimony of O. T. Trapp and Norbin Jones, witnesses for the defendant, offered to prove the confession of Henry Brown, as shown by stenographer’s notes.” The proffered testimony as shown by the record was to the effect that Henry Brown, after the trial of the case in the justice of the peace court, after the *habeas corpus* trial before the chancellor, after one trial of the case in the circuit court, after the second trial of the case in the circuit court, and after an appeal to this court from the conviction of the lower court, came to the sheriff of the county, and surrendered himself, claiming that he, and not his brother, Albert, did the killing. Whereupon the sheriff confined him in jail, and kept him there until the next grand jury of the county convened, who investigated the matter, and placed so little credence in, and attached so little importance to the so called confession of Henry Brown, that they absolutely paid no attention to it and refused to indict him upon his own confession. He was thereupon released from custody by the sheriff and remained in the county until a short time before the next term of court, when, it seems, after all danger was over, and there was no prosecution against him, and no threatened prosecution, he decided to seek safety in the “tall and uncut timber.” On the trial of the case in the court below defendant offered this testimony as going to show that Henry Brown and not Albert did the killing. The court, as we contend, very properly excluded the testimony on the ground that it was hearsay, and it is upon this point that appellant asks this court to grant him a new trial.

Practically the only authority submitted by counsel for appellant in support of their contention that this testimony was competent and should have gone to the jury is 2 Wigmore on Evidence, pars. 1476 and 1477, in which the learned author states that the great weight of authority is against the admissibility of such evi-

dence, but that, in his opinion, it should be competent. In this position, he stands practically alone, and his views upon this question run counter to the unanimous holding of the courts of this country and also of England. 12 Cyc. 399, par. n., uses the following language:

"The cases are not harmonious as to the relevancy of evidence incriminating outsiders in the crime with which the accused stands charged. It has been held that he may show that another actually committed the crime, if the evidence incriminating the other is inconsistent with his own guilt, but it is not admissible to show that another person is or was suspected, or has been indicted for the crime." *Brown v. State*, 120 Ala. 342; *Peoples v. Thompson*, 33 N. Y. (App. Div.) 177; *Ray v. State*, 10 Yerg. (Tenn.) 258; *Greenfield v. People*, 85 N. Y. 75; *Johnson v. State*, 43 S. W. 1007; *Taylor v. Com.*, 90 Va. 109.

The flight by the third person, his motive to commit the crime, his bad character, or even his confession of the crime, is irrelevant to exculpate the accused." *Lerison v. State*, 54 Ala. 520; *State v. Taylor*, 136 Mo. 66; *Bennett v. State*, 56 Ala. 370; *State v. Yandle*, 166 Mo. 589.

In the same volume, 12 Cyc., at p. 434, par. 1, we find:

"The declarations of a person other than the accused, confessing that he committed the crime, are not competent for the accused, for although the latter may exculpate himself by proving, if he can, that some one with whom he was not connected, committed the crime with which he is charged, he cannot do so by hearsay; and this rule is not changed by the fact that the declarant is dead, or even by the fact that he confessed on his death bed." *Welch v. State*, 96 Ala. 92; *Owensby v. State*, 82 Ala. 63; *Alston v. State*, 63 Ala. 178; *Snow v. State*, 58 Ala. 372; *Snow v. State*, 54 Ala. 138; *Wolfolk v. State*, 85 Ga. 69; *Moughon v. State*, 57 Ga. 102; *State v. Smith*, 36 Kan. 618; *State v. West*, 45 La. 928; *State*

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v. *Hack*, 118 Mo. 92; *State v. Duncan*, 116 Mo. 288; *State v. Evans*, 55 Mo. 460; *State v. Levy*, 90 Mo. 643; *Peoples v. Schooley*, 149 N. Y. 99; *Greenfield v. People*, 85 N. Y. 75; *People v. Greenfield*, 23 Hun, 454; *State v. Gee*, 92 N. C. 756; *State v. Beverly*, 88 N. C. 632; *State v. Baxter*, 82 N. C. 602; *State v. White*, 68 N. C. 158; *State v. Duncan*, 28 N. C. 236; *State v. Fletcher*, 24 Or. 295; *Peck v. State*, 86 Tenn. 259; *Holt v. State*, 9 Tex. App. 571; *Horton v. State*, 24 S. W. 28; *U. S. v. McMayon*, 4 Cranch C. C. 573; *U. S. v. Miller*, 4 Cranch C. C. 104; 14 Cen. Digest, par. 981; *West v. State*, 76 Ala. 98; *Davis v. Com.*, 95 Ky. 19.

"Evidence by a witness that a third person told him that he committed the crime is incompetent as hearsay." *Com. v. Chabbock*, 1 Mass. 144.

In 16 Cyc. 1199, par. b., we find the following:

"Confessions or criminal admissions by a third person are irrelevant on the issue as to whether the party on trial committed the crime to which such confessions or admissions refer, in the absence of conspiracy, or other established relation of agency; and the same rule applies to statements or other acts of the third person which tend to establish circumstantially the guilt of the latter."

Under the above text I desire to refer the court to the long list of authorities cited thereunder, from almost every state in the Union, and also from the United States Court.

Mr. Wigmore himself concedes that his views are contrary to the great weight of authority, not only in this country, but in England. He seeks to have this rule which has been so firmly established for all these years, and which is so wholesome in its application, changed and over-turned by reason of the fact that it might in some particular case work a hardship, and therefore he denounces it as barbarous.

McWILLIE, Special Judge, delivered the opinion of the court.

The appellant was indicted for the murder of Alonzo Addison, and, his previous conviction for manslaughter having been reversed (54 South. 305), he was again tried and convicted of the same offense, and from this second conviction the present appeal is prosecuted.

On the second trial the defense offered to prove that Henry Brown, a brother of the accused, who had never been indicted, stated to the sheriff and chancery clerk of the county that his brother had suffered long enough about the matter, that he was the man who slew the deceased, and that his brother was not present and had nothing to do with it in any way; that in pursuance of this confession he was taken in custody by the sheriff and held a prisoner in the county jail for several months; that his confession and incarceration took place during the pendency of the former appeal herein; that before the reversal of judgment on that appeal, the grand jury having investigated the matter and failed to find an indictment against him, Henry Brown was discharged from custody and was absent without the procurement of the accused and his counsel, and his whereabouts were unknown to him and them, process for him as a witness for the accused having been returned "not found." On the objection of the state the court refused to admit the evidence, and its action in so doing is assigned for error.

It is well settled that testimony going to show confessions and admissions on the part of third persons made out of court is not admissible in exculpation of those on trial for crime. It is mere hearsay, and is excluded for this reason, although other reasons doubtless exist in the uncertainty to which it would subject all criminal proceedings. The following authorities clearly support this view: *Snow v. State*, 54 Ala. 138; *Snow v. State*, 58 Ala. 372; *West v. State*, 76 Ala. 98; *Owensby v. State*, 82

Ala. 63, 2 South. 764; *Welsh v. State*, 96 Ala. 92, 11 South. 450; *Lyon v. State*, 22 Ga. 399; *Moughon v. State*, 57 Ga. 102; *Davis v. Commonwealth*, 95 Ky. 19, 23 S. W. 585, 15 Ky. Law Rep. 396, 44 Am. St. Rep. 201; *State v. West*, 45 La. Ann. 928, 13 South. 173; *State v. Young*, 107 La. 618, 31 South. 993; *State v. Evans*, 55 Mo. 460; *State v. Duncan*, 116 Mo. 288, 22 S. W. 699; *State v. Hack*, 118 Mo. 92, 98, 99, 23 S. W. 1089; *Greenfield v. People*, 85 N. Y. 75, 86, 39 Am. Rep. 636; *Id.*, 23 Hun (N. Y.) 454; *State v. White*, 68 N. C. 158; *State v. Gee*, 92 N. C. 756; *State v. Fletcher*, 24 Or. 295, 33 Pac. 575; *Peck v. State*, 86 Tenn. 267, 6 S. W. 389; *Rhea v. State*, 10 Yerg. (Tenn.) 258; *Horton v. State* (Tex. Cr. App.), 24 S. W. 28; *Bowen v. State*, 3 Tex. App. 623; *United States v. McMahon*, 4 Cranch C. C. 573, Fed. Cas. No. 15,699; *United States v. Miller*, 4 Cranch C. C. 104, Fed. Cas. No. 15,773.

Wigmore, in his learned work on Evidence, while admitting that the weight of authority sustains the rule as stated, condemns it as unsound and barbarous. 2 Wigmore, section 1476. In this he finds no support in the other text-writers on the subject, nor in the legal encyclopedists, who perhaps had greater deference for the opinions of those learned judges who, daily witnessing the application of the law, refused to sacrifice its wholesome principles to untried theory. Best on Ev. (3d Am. Ed.), p. 73; 2 Rice, Cr. Ev., p. 136, section 87; Wharton, Cr. Ev. (9th Ed.), p. 176, section 225; 12 Cyc., p. 434. The learned author above named criticises as "curious" and suggesting a "fantastic suspicion" the following language employed by the supreme court of Georgia in the case of *Lyon v. State*, *supra*: "All one defendant would have to do would be to admit that his guilty accomplice was innocent and that he himself had perpetrated the crime, absent himself so as to enable the party on his trial to have the benefit of his admission, and, after his acquittal, appear, demand his trial, and prove by

the evidence of the acquitted party that he was in fact the guilty person.”

We are unable to concur in the author's estimate of the above reasoning. It commends itself to this court as entirely sound, and, in view of the action of the grand jury in discrediting the confession and refusing to return an indictment against the declarant on the strength of it, we have little doubt that the case in hand itself affords an illustration of such attempts to bring about a miscarriage of justice. The rule excluding such confessions itself suggests the reason why they have not been more frequently resorted to in behalf of the guilty. The confession in question was made out of court, was not supported by the oath of the party confessing, and the party was never subjected to cross-examination, which might very quickly have disclosed the falsity of the confession and the motive that prompted it. The law, in determining what is hearsay, does not admit what a witness states some other person told him, any more than it admits what still another person may have imparted to the one next in line of communication. It is all hearsay; and no just exception can be made because the party confessing has put himself in a position of some hazard. Many motives, apart from the love of truth and justice, induce men to assume the gravest risks. Among the strongest of these is family affection, and it is observable that in this case the property against which the trespass was directed was that of Henry Brown and not his brother, the accused, and that in the confession proposed to be proved Henry Brown, while claiming to be the culprit, stated that his brother “had suffered long enough about the matter.” The extreme case of a confession on the gallows by one claiming to be the true offender, employed by Wigmore to illustrate his view, affords no ground for the relaxation of the rule; for the experience assuring us that the last breath of men not wholly bad is sometimes employed in the asservation of

a falsehood justifies the rejection of the hearsay statements of a malefactor who, having no longer any concern as to his own fate, may wish to serve a pal, a kinsman, or a friend. Even dying declarations, which are restricted to trials where the declarant was the victim of a homicide, although they derive additional solemnity from the fact of approaching death, are admitted really for necessity, and in order to reach those manslaughterers who perpetrate their crimes when there are no other eyewitnesses.

While the question is one of admissibility of evidence, rather than of its probative force, it might be remarked, as showing the caution with which all confessions are received, that the confession of the accused himself is not admissible in the absence of evidence establishing the *corpus delicti*. It is worthy of note in this case that, although Henry Brown had been present at the previous trial of his brother, he remained wholly silent as to his authorship of the crime, and that his confession was not made until the state had disclosed all of its evidence and the trial resulted in a verdict of manslaughter, on which his brother was sentenced to imprisonment for the short term of two years. The hazard he assumed was not, therefore, one of very great gravity, especially as his running away on being released goes strongly to show that, apart from facing a jury in his brother's behalf, he did not intend to incur any decided risk, and was ready to recant his confession as soon as it had served its purpose or exposed him to any great peril. This much is said in answer to the suggestion that only an imperative sense of guilt could have moved him to brave the great dangers that attended his confession, and as going to show that the supposed harshness of the rule may afford no reason for not adhering to it and excluding hearsay evidence as inadmissible.

It is assigned for error that the court below excluded the following question, addressed on cross-examination

to Vestor Addison, one of the two eyewitnesses of the tragedy and brother to the deceased: "Wasn't there a crowd of men there, B. Harris and several others, that Mr. McNees got together there and told them they would have to hold the inquest, and you were right there, and they couldn't get any testimony about who did the shooting, and found that he came to his death by an unknown hand?" The purpose of this question was, of course, to discredit the witness, who had identified the accused as the slayer when seen by moonlight only a few feet distant. The witness had already testified that he paid no attention to the inquest, and it will be observed that the question involves no inquiry as to whether he testified differently, or at all, at the inquest, or was called on to testify at the same, and refused or evaded doing so, but merely that his attitude on the night of the killing was a negative one as to the identification of the accused. While he contradicted the several witnesses who testified that he in terms denied on the night of the killing that he was aware of the identity of the slayer, it was unquestionable on the evidence that he did not that night reveal who had committed the crime, unless he informed the deputy sheriff, who arrested the accused on the same night. This deputy, after he had testified that he made the arrest, was asked by the prosecution what conversation he had with the witness Vestor Addison on that night, when the court excluded the question on the objection of the defense, and the case went to the jury as if the accused had made no revelation that night as to the identity of the slayer. As thus viewed, the question in relation to the inquest could have evoked no other evidence favorable to the accused than such as would have been at most merely cumulative, and its exclusion does not constitute reversible error. *Affirmed.*

99 Miss.]

Brief for appellant.

L. L. CONNERLY v. LINCOLN COUNTY.

[55 South. 963.]

1. JUSTICE OF THE PEACE. *Fees. Code 1906, section 2182, paragraph V.*

Under paragraph V, section 2182, Code 1906, providing that justice of the peace shall receive "for services as conservators of the peace and for examination of cases of persons charged with felony, to be paid out of the county treasury on the allowance of the board of supervisors, on a detailed fee-bill in each case, annually a sum not exceeding fifty dollars." *Held*, that a justice of the peace cannot charge a lump sum for services as conservator of the peace and can only recover for the fees actually earned, as shown by a detailed fee-bill, and each item charged in such detailed fee-bill must be specifically authorized by some statute.

2. SAME.

Under this statute a justice of the peace can never recover more than fifty dollars in any one year and his fees may amount to much less.

APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Suit by L. L. Connerly against Lincoln county for the allowance of a claim for fees, etc. From a judgment of the circuit court, affirming the order of the board of supervisors disallowing the claim, he appeals.

The facts are stated in the opinion of the court.

M. McCullough, for appellant.

Appellant here contends that this justice of the peace in a rural district of the county is entitled under our law to an annual fee of fifty dollars to be allowed out of the county treasury by the board of supervisors whether he presents an itemized fee-bill for so much or not. Section 2182 (V), reads as follows:

"For services as conservators of the peace, and for examination of cases of persons charged with felony, to

be paid out of the county treasury on the allowance of the board of supervisors, on a detailed fee-bill in each case, annually, a sum not exceeding \$50.00."

We here contend that the law allows pay for two distinct kinds of services although the duties are closely related. The justice of the peace fills two offices, the duties of which by our statute devolve on one officer. The justice of the peace acts as conservator of the peace and as justice of the peace. I contend that the above section providing for his annual allowance by the county board of supervisors authorizes its payment even though his "itemized" fee-bills do not amount to fifty dollars for the reason that the Code section authorizes his pay for two kinds of service. First, the board must pay him as conservator of the peace" and secondly as justice of the peace on fee-bills in felony cases. For the second class of cases he cannot be paid for more than the amount of his itemized fee-bills. But the word conservator in the section quoted above means something in this connection. The section recognizes that he gets pay for two kinds of service. It is by our statute that the justice of the peace investigates any felony case, and so that investigation is made under his authority as a justice. Take away our statute giving him the power to investigate felonies and under our law he has no such power derived from the common law.

Following out the old common law principle relative to the high office of conservator of the peace, which was once considered an office of far greater dignity and honor than it is considered to-day, our state embodied in its Constitution of 1890 the following section:

"Section 167. All civil officers shall be conservators of the peace and shall be by law vested with ample power as such."

I find that this same provision was in former state Constitutions. Under this constitutional provision I maintain that every justice of the peace, being a civil offi-

99 Miss.]

Brief for appellant.

cer, is vested with all the common law powers and also all statutory powers as conservators of the peace.

By the English Act of Edward III it was directed that certain persons be appointed in each county as conservators of the peace, whose duty should be "for the better keeping and maintenance of the peace," and such persons "shall be assigned to keep the peace." Until 1344 the conservators of the peace simply had power to keep the peace, but by the Act of Edward III these conservators of the peace were given their first judicial powers. By that act these conservators of the peace, later called "justices of the peace" were authorized to try cases and punish certain criminals. As originally constituted these "wardens" of peace had only ministerial criminal powers and their civil powers were purely statutory. For authorities as to the history of this matter, see 18 Am. & Eng. Ency. Law (2d Ed.), pp. 8 and 9; 6th Chitty's Statutes (5th Ed.); *Schrouder v. Ehlers*, 31 N. J. L. 44.

The intent and meaning of our state Constitution, as quoted above, is that all the ancient and common law powers of conservators of the peace be maintained to this day.

In the 24th volume of "Cyc." p. 417, is found the following paragraph with numerous citations:

"The functions of justices as conservators of the peace have been universally retained under the Constitutions and statutes of the states of the Union. As conservators of the peace, justices have the power to arrest and commit offenders, or insane persons, require bonds to keep the peace and be of good behavior, appoint special constables, order the delivery of stolen property to its owner, prohibit or disperse public meetings, and order the removal of disorderly persons from such meetings."

It may be argued that all the powers and duties of justices as conservators of the peace are comprehended in sections 1535, 1534, 1536, 1537 and 1538 of the Code

Brief for appellant.

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of 1906. I do not hold to that contention, but maintain that these Code sections constitute only a few of the *many* duties of conservators of the peace. These sections outline conservator's duties in hearing cases of persons actually charged with felonies, giving them general powers of issuing process for witnesses, taking bonds for appearance as circuit courts, for fixing the amounts of bonds, and such like. They are statutory powers conferred on justices of the peace, and they have nothing to do with the broad powers exercised by conservators of the peace under either the common law or under our Constitution. Just because these Code sections outline some of the duties of justices in certain kinds of cases, it does not at all follow that they contain the entire law on the subject of the powers and duties of conservators of the peace.

It is one thing to exercise powers that are given by an express statutory enactment, and it is quite another thing to be a conservator of the peace "vested with ample powers as such," under the express reading of the state Constitution.

Now it is my contention that the evident purpose of section 2182 (V), of the Code, is two-fold: (1) to authorize the board of county supervisors to compensate the officers for services as conservators of the peace, and (2) to compensate them for investigations of cases of felony where an affidavit was actually made and the person arraigned on a charge or affidavit.

This section, I think, authorizes the board to pay the conservators for service that was never intended to be tried or heard as a case where an actual affidavit charging crime was pending. Your justice of the peace is expected to preserve the peace in his district as well as to try and punish infractions of the peace. If the conservator is present when two citizens become involved in a difficulty and a breach of the peace or a disturbance of the peace is eminent, or even likely to occur, it is the

solemn duty of the conservator of the peace to interfere and preserve good order. In this way he promotes peace in the community and thus does good and valuable service for which there can be no case tried, or "itemized fee-bill" rendered. To illustrate, suppose at some public gathering citizens are engaged in a difficulty or a general row obtains, it is here that the faithful conservator of the peace steps in and arrests the offenders or breachers of the peace and either sends them away to jail or places them under bonds (if bonds can be given), and for this good service to the community, no provision is made in the Code for fees for service, until after an affidavit has been made. In other words this valuable officer performs good service in cases just like the above illustration, and there is absolutely no express provision in the Code for making out a "fee-bill" to cover the cost for the service, unless I am right in my contention that section 2182 (V) provides for payment for such service. Carry on the illustration of a supposed row or disturbance at some public gathering in the conservator's district; and it becomes necessary for the conservator to call other citizens and specially deputize them to help him preserve the peace. Suppose by this act he succeeds in quelling the supposed riot or disturbance, can it be argued that there is no provision for reasonable compensation for such service. Of course, if some one commits a felony and an affidavit is lodged against him, and the conservator investigates a real charge, then it is admitted that he can present to the board his itemized fee-bill and the law authorizes pay not to exceed fifty dollars annually. But what about compensation for his bringing about and preserving the peace and quelling the supposed disturbance. If the view that no pay should be given for this service is adopted, then the law encourages the justice or conservator to wink at the coming or impending disturbance and avoid preventing same so that an open, positive crime may be committed

Brief for appellee.

[99 Miss.]

so that he can get a "case" to try and thereby make his fees. Your law does not provide for pay for his making arrests at public gatherings or elsewhere, nor does it pay him for using his authority to appoint other persons when necessary as special deputies to assist him in maintaining or restoring peace and good order. Now, suppose the conservator thinks it necessary to protect the state by compelling witnesses to enter bonds for their appearance on the day of hearing these disturbers of the peace, which I have presumed to occur occasionally, then you have no law to pay him for valuable service unless by contention is the correct one about the construction to be placed on section 2182 (V).

My contention is that the code section quoted allows to Mr. Connerly fifty dollars a year for each of the years 1908 and 1909. The law allows annually fifty dollars, and no more, for the two kinds of service rendered. Justice Connerly heard one or more cases charged with felonies for each of the years 1908 and 1909, and on these he presented fee-bills itemized and the totals of such bills were paid, but for these two years there is till due him a balance, as conservator and justice, of seventy-seven dollars and sixty cents.

Jas. R. McDowell, assistant attorney-general, for appellee.

A complete answer to the contention of appellant here is found in section 2182-v, Code of 1906. It will be observed that the statute gives a justice of the peace fees for examination of persons charged with felony, payable on an itemized fee-bill in each case a sum not exceeding fifty dollars in any one year. This could mean nothing else than that he must earn whatever part of this fifty dollars he receives. There can be no other reasonable interpretation of the statute. The legislature would not have used the words "not exceeding fifty dollars to be paid on itemized fee-bill," etc., if it meant to give him

the whole fifty dollars whether he rendered any services or not. It fixes the maximum here at fifty dollars, but requires him to earn his compensation within that limit and make an itemized statement to the board before he receives his pay so that the board may know exactly how much he has earned.

It is too plain for argument that the court acted properly in declining to allow this appellant fees which he had not earned. He got what he was entitled to. The judgment should be affirmed.

ANDERSON, J., delivered the opinion of the court.

The appellant, Connerly, a justice of the peace of Lincoln county, presented his claim to the board of supervisors of that county for thirty-eight dollars for the year 1908, and thirty-nine dollars and sixty cents for the year 1909, making a total of seventy-seven dollars and sixty cents, for services as conservator of the peace for those years, which he contends he was entitled to under the provisions of paragraph "v," section 2182, Code 1906. The board rejected his claim, from which order he appealed to the circuit court, where there was a judgment affirming the order of the board, from which he appeals to this court.

Paragraph "v" of section 2182 is as follows: "For services as conservators of the peace, and for examination of cases of persons charged with felony, to be paid out of the county treasury on the allowance of the board of supervisors, on a detailed fee-bill in each case, annually, a sum not exceeding fifty dollars." For appellant's services in the examination of felony cases, the board, on a detailed fee bill, in each case allowed him twelve dollars for the year 1908, and ten dollars and forty cents for the year 1909. His contention is that for his services as conservator of the peace he was entitled for each of said years, without the rendition of any itemized fee-bill, to an additional amount sufficient to

make his compensation fifty dollars a year; in other words, that the correct construction of paragraph "v," section 2182, is that justices of the peace, for their services as conservators of the peace and in the examination of cases of felony, are entitled to fifty dollars a year, whether their fees allowed by statute for such services amount to that or not. In determining what is meant by the language, "for services as conservator of the peace," it will be well to bear in mind that a justice of the peace may take an affidavit charging felony, and for reasons satisfactory to himself require a bond of the defendant for his appearance and examination before some other justice of the peace, and in such a case issue subpoenas for the witnesses; and in doing so he would be acting strictly as a conservator of the peace, and not in the examination of cases of felony. Perhaps there are other duties imposed by law on justices of the peace in their capacity as conservators of the peace touching charges of felony, for which they would not be entitled to make the defendant pay their fees. In all such cases they are entitled, under this statute, to an allowance of their fees and for services in the examination of felonies, on the rendition by them to the board of a detailed fee-bill therefor, provided the amount of such fees may not exceed the sum of fifty dollars in any one year; and each item charged in such detailed fee-bill must be specifically authorized by some statute. If such fees, so itemized, do not amount to fifty dollars in any one year, the board is only authorized to allow the actual fees earned. They, therefore, can never exceed fifty dollars in any one year, and may amount to much less. There is no authority under this statute for charging a lump sum for services as conservator of the peace. The language, "on a detailed fee-bill," qualifies both the first and second clauses of the statute. *Affirmed.*

BOARD OF SUPERVISORS OF HOLMES CO. *v.* BLACK CREEK
DRAINAGE DISTRICT.

[55 South. 963.]

1. DRAINS. *Property assessable. Constitution, section 170. Code 1906, section 1721. Board supervisors.*

Code 1906, section 1721, providing that if, in the organization of a drainage district and the construction of ditches and drains thereunder, any public road or railroad or turnpike shall be benefited by said system of drainage, the said commissioners shall have the right to assess said road, public road, rail roads benefited, etc., is violative of section 170 of the Constitution 1890, in so far as said act confers on the drainage commissioners power to assess the public roads with such an amount as they may deem said roads benefited by the drainage district, since under said section 170 of the Constitution, "the boards of supervisors have full jurisdiction over roads, etc."

2. STATUTES. *Validity.*

Where a part of a drainage act is unconstitutional, but the invalid portion of the statute is clearly separable from the balance, and there is left a consistent drainage scheme, the balance of the act is not affected thereby.

APPEAL from the chancery court of Holmes county.

HON. JAMES F. McCool, Chancellor.

This is an appeal from the vacation decree of the Chancellor rendered in pursuance of the provisions of chapter 39 of Code 1906, relative to drainage districts, by which decree the assessment of the commissioners for the district of benefits received by landowners in the district was approved.

W. L. Dyer, for appellant.

Any assessment laid upon the roads, or other county property, requiring to be discharged in money must necessarily be discharged by the county, and is, therefore,

a charge on the county, if there is any liability anywhere. The inanimate land could not very well pay the money into the treasury, if it had it.

As the private owner must discharge the burden laid on his land, so the county must discharge any liability fixed on the roads. If the private owner fails to do this, then his lands may, and will, be sold in satisfaction, as provided by section 1703 of the Code.

This rule could not be applied to the public roads, in view of section 170 of the Constitution; the legislature can confer authority on no one, other than the board of supervisors, to sell the roads. Probably not the board while existing as roads.

The legislative power in this respect is confined to regulating the constitutional jurisdiction of the boards. *Board v. Arrighi*, 54 Miss. 668; *Paxton v. Baum*, 59 Miss. 531; *Seal v. Donnelly*, 60 Miss. 658; also, *Monroe Co. v. Strong*, 78 Miss. 565.

If there can be no imposition placed directly on the roads, then by implication the assessment must fall on the county, if it be a liability anywhere, to be paid out of the general funds raised by general taxation and is clearly within the prohibition of section 183.

The third and fourth exceptions taken by the county to the assessment is on the ground that such attempted imposition of taxes on the public roads is not such regulation of them as is within the power of the legislature to make, but is an infringement of the constitutional jurisdiction of the board of supervisors, conferred by section 170 of the Constitution.

Such imposition of taxes is, in effect, an appropriation of the roads to other purposes, foreign to their use as highways.

Not merely an additional servitude, such as the use for street railway, telegraph and such like purposes.

Is, in effect, if the statute could be carried out as written, a deprivation of the property, which our court says

cannot be done, if the board was thereby deprived of its power over it. *Supervisors v. Arrighi*, 54 Miss. 672.

The statute is an attempt by indirection to do the things prohibited by both sections 170 and 183 of the Constitution; if I am correct in this position, no authority is necessary to sustain the proposition that the statute exceeds the legislative power.

H. H. Elmore, for appellee.

The legislature may prescribe regulations as to the exercise of jurisdiction by the board of supervisors over roads, ferries and bridges; but it cannot deprive the board of its jurisdiction. It is very difficult to define where regulation ceases and deprivation begins. So far as I have been able to discover no rule has been announced by our Supreme Court defining the limits within which the legislature may regulate the jurisdiction of the supervisors. It would seem that the legislature may go as far as it desires, provided always that the board is not deprived of its jurisdiction. Measured by that rule the section of the drainage law imposing a tax on the roads could not in any sense be said to be deprivation of the jurisdiction of the board. It might be so, if the tax should be enforced by a sale of the roads but this would not be the proper method of enforcing the tax and would not be permitted.

The legislature may do all that which is not prohibited by the Constitution of our state, or of the federal Constitution. According to our views there is nothing in either which prohibits the legislature from requiring the county to pay such sum as will be commensurate with the benefits derived by the public on account of the benefits to the road.

ANDERSON, J., delivered the opinion of the court.

There is involved in this case the constitutionality of section 1721, chapter 39 ("Chancery Court Drainage

District Chapter”), Code 1906, in so far as it affects public roads. That section is as follows: “If, in the organization of said drainage district, and the construction of ditches and drains thereunder, any public road or railroad or turnpike road shall be benefited by the said system of drainage, the said commissioners shall have the right to assess the said road, public road, railroad or turnpike road such amount as they may deem said roads or railroads benefited, which assessment shall be made at the time of assessing the lands of said district, and said roads or railroads shall have the right to appear and make objection as landowners in said district at the time of hearing objections to such assessment.” The Black Creek drainage district, in Holmes county, was duly organized under the provisions of that chapter. The drainage commissioners assessed the county for benefits to its public roads traversing said districts, as follows: “Holmes county, Mississippi, for benefit to the Howard turnpike, fifteen hundred dollars; Holmes county, Mississippi, for benefit to the Tipton public turnpike, five hundred dollars.” This assessment was approved by decree of the chancellor rendered in vacation, in accordance with said chapter 39, from which decree the county appeals to this court. Section 170 of the Constitution provides, among other things: “The board of supervisors shall have full jurisdiction over roads, ferries and bridges, to be exercised in accordance with such regulations as the legislature may prescribe, and perform such other duties as may be required by law.”

It is contended, on behalf of the county, that in so far as section 1721, Code of 1906, confers on the drainage commissioners power to assess the public roads with such amount as they may deem said roads benefited by the drainage district is violative of the above clause of section 170 of the Constitution, because thereby the board of supervisors is deprived to that extent of jurisdiction over such roads. It was held in *Jefferson County v.*

Arrighi, 54 Miss. 668, that the jurisdiction of the board of supervisors over roads, ferries, and bridges, conferred by the Constitution, could be *regulated* by the legislature, but not taken away. The court said: "Jurisdiction over roads, ferries and bridges is by the Constitution conferred upon the board of supervisors, just as equity jurisdiction is conferred upon the courts of chancery and appellate jurisdiction upon this court. It is not within the power of the legislature to take away these several jurisdictions, or bestow them upon other tribunals; but, by virtue of its possession of the general legislative authority of the state, it may prescribe the mode and manner in which these several jurisdictions shall be exercised, and the regulations prescribed will be obligatory, unless they amount practically to deprivation of power."

In *Seal v. Donnelly*, 60 Miss. 659, the court held that the right to deal with roads, ferries, and bridges could not be taken away from the board of supervisors and confided in another magistracy, but that the mode and manner of the exercise of such right could be regulated by the legislature. Is section 1721 a mere regulation of the manner of the exercise of this constitutional power conferred on the board of supervisors, or does it amount to a deprivation or abridgment of such power? If the latter, the statute is unconstitutional; if the former, it is valid. The statute expressly confers, in clear and unmistakable terms power on the drainage commissioners to determine to what extent, if any, the public roads traversing the drainage district are benefited by the system of drains, and to assess such roads with such amounts as they may deem they are so benefited, which is made a charge on all the taxpayers of the county. The assessment of such benefits is not made subject to the approval of the board of supervisors. By the statute the supervisors are deprived of all power whatever to determine whether such roads are benefited, and, if so,

how much, and the sum with which the county is to be charged on account of such benefits. In other words, to the extent provided by the statute, the jurisdiction of the public roads, in these drainage districts, is taken away from the board of supervisors and conferred on the drainage commissioners. In our judgment, it would be hard to conceive of a statute more clearly violative of the clause in question of section 170 of the Constitution.

However, neither the remainder of this section nor the other provisions of chapter 39 are affected by the unconstitutionality of the provision under consideration. The invalid portion of the statute is clearly separable from the balance, and there is left a consistent drainage scheme, which doubtless the legislature would have adopted, had it known it was without power to pass this provision here condemned as unconstitutional.

Reversed and remanded.

MAYES, C. J., dissents.

W. D. SHIVERS v. FARMERS MUTUAL FIRE INSURANCE
COMPANY.

[55 South. 965.]

1. FIRE INSURANCE. *Description of property. Parol evidence.*

Where by mistake the property insured under a fire insurance policy is described as being in section 11 instead of section 2, this is immaterial where there is sufficient left in the policy after rejecting the erroneous description to identify the situation of the property insured, although the policy provides that it shall be void if the insured has misrepresented any material fact concerning the subject-matter.

2. INSURANCE. *Construction of policy.*

Fire policies will be construed most strongly in favor of the insured, the policy should be constructed, if practicable, so as to cover the

subject matter intended to be covered and a portion of the description which is false may be disregarded if enough remains to identify the property.

3. PAROL EVIDENCE. *Intention. Admissibility.*

Parol evidence is not admissible to so extend the terms of the policy as to cover property not intended in the description, but it may be received for the purpose of applying the description to the property intended to be described.

4. JUDICIAL NOTICE.

The courts take judicial notice that section 2 adjoins section 11 on the north in the same township and range.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Suit by W. D. Shivers against the Farmers Mutual Fire Insurance Company. From a judgment sustaining a demurrer to the declaration, plaintiff appeals.

The facts are stated in the opinion of the court.

Hilton & Hilton for appellant.

The sole question, as we see it, presented to this court, is whether or not the plaintiff should have filed his suit in the chancery court for a reformation of a contract of insurance, and ask for a judgment under the reformed contract or whether or not he had a standing in the forum in which he did go, which is the circuit court. This question centers about the one allegation in the amended declaration, which is the averment that a mistake as to the location in describing the situation of the property was made. This allegation must be viewed, of course, in the light of the other allegations of the amended declaration, which specifically averred that the agent of the company was on the premises when it was insured, and saw and inspected the property as described in the policy, and the other averment that this misdescription as to the location of the property was immaterial, for the reason that it did not affect the hazard of the risk, or

the rate of the premium, or any other rights of the defendant.

Our view of the law is that if the misdescription in the policy as to its situation was immaterial, and has no effect upon the rights of the defendant, and was no inducement to the contract, and it can be wholly disregarded in a court of law, and does not affect the right of suing in the law court, it does not require the plaintiff to have a reformation of his contract before suit is brought. For authority along this line, we cite the court to the second paragraph of section 191 of the 6th Edition to Bispham's Principles of Equity, the said second paragraph being on page 275. It is there specifically said, "That the mistake must be material, because the court will not interpose its extraordinary relief for slight errors in matters which are not of much importance, as misrepresentations will not vitiate the contract unless it relates to something, which is a material inducement to the parties to act; so a mistake will not justify a man in seeking equitable relief, if it is a mistake relating to some trivial matter, which does not substantially influence his action." In the same authority, paragraphs 216 and 217, beginning on page 307 under the subject of Frauds, this principle of law was elaborated upon, and numerous authorities are cited in support of this principle of law. We refer, also, to Kerr on Fraud and Mistake, pages 73 and 74. This same principle of law is announced, and on pages 407 and 408 of the same authority, we find under the subject of Mistakes, that the law is, that the court of equity will not entertain suits to correct mistakes where the parties have remedies at law, and on page 408 the courts of equity will not lend its aid to correct mistakes which are not material in nature, and are not of the essence of a transaction, and are only incidental to it. Numerous authorities are cited in this work in support of this principle of law. Then, if this mistake in describing the situation of the property is an immaterial

error or mistake, we are rightfully in a court of law and should not seek the aid of equity. In the case of *Hatch v. New Zealand Insurance Company*, 67 Cal. 122, it is held that in a policy of fire insurance, a portion of the description which is false will be disregarded where enough remains to identify the property. In the case of *Phoenix Insurance Company v. Gebhart*, 32 Neb. 144, and *Omaha Fire Ins. Co. v. Dufek*, 44 Neb. 241, it was held that the misdescription in an insurance policy of the land in which personal property insured was situated, was not material to the risk, and will not avoid policy, if the property itself is properly described. In 19 Cyc., p. 664, in discussing description of subject-matter, under subject of Fire Insurance, under "1" it is said "a portion of the description which is false may be disregarded, if enough remains to identify the property. The rule being to support the contract of indemnity when possible." Authority is cited under this statement of the law. And in 19 Cyc., under the subject of Fire Insurance, on page 670, under number 15, the law is announced there as being that parol evidence may be received for the purpose of applying the description to property intended to be described in the insurance policy. This is the law in courts of law, as well as courts of equity.

Now, we contend, if the court please, by the face of the policy itself, the property is sufficiently described, even if it had made no reference as to what section of land it was located in. The real property is described as a dwelling-house, and as a smoke house. The personal property is described in specie, and is stated to be located therein; that is in the dwelling-house and smoke house, not in a section of land. The afterthought added to the description is not necessary to be written in the policy to identify the property, which was insured and destroyed by fire. We do not think counsel for appellee would seriously contend that the description of the property,

both real and personal, would not be full and complete for all purposes necessary to recover in a court of law, if no mention whatever was made of its being situated in any section of land. In the case of *Doherty v. German American Ins. Co.*, 67 Mo. App. 526, the court said that the defects were immaterial "where the property insured was described as located on a certain tract of land, and a part of the land was in section 7, and two and one-half acres of the tract were excepted for church purposes. The application placed the tract in section 8 and said nothing of the church exception. That case is directly in point with the case at bar, and we cite the court to the case of *Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89, in which it is held, "it is not a point material to the risk that a mill situated in the corner of one section is described in the application as being in the adjoining corner of the next section just across the stream." This case is on all fours with the case at bar.

Barbour & Henry, for appellee.

The counsel for the appellant, in their brief, take the position that, because the declaration alleges that the misdescription of the property insured is immaterial, that a reformation is not necessary or proper. It is true that all allegations of fact are taken as true on demurrer, but the allegation here relied upon is not one of fact, but is a conclusion of law. It is the very thing that this court must determine in order to decide whether a reformation was necessary.

The policy is made a part of the declaration, and contains the following: "The following described property, while located and contained as described herein, and not elsewhere, to-wit: Then follows the property, including the dwelling-house, which of course is real estate, as follows: "Located in section 11, T. 9, R. 20 west, county of Simpson, one mile from Shivers, Mississippi." The plaintiff, in drawing its declaration, alleges, in substance

that the minds of the parties met upon the question of what property was being insured, but that "by inadvertence or mistake, the location of the property insured was misdescribed so far as its situation is concerned, that is to say, the policy issued described the dwelling-house, and other property insured by said policy, as being located in section 11, T. 9, R. 20, when it should have been section 2, T. 9, R. 20."

The suit is upon the policy of insurance, that forming the basis of the action. If the case had proceeded to trial, the proof made that the house had burned, with its contents, the location of property shown to have been in section 2, then, had the plaintiff offered the policy showing the property insured to have been situated in section 11, it is too plain for argument that he would have been promptly met with the objection to the effect that there was a fatal variance between the proof and the allegation of the declaration. For this reason, the court permitted the withdrawal of the pleas and the filing of the demurrer in this case. The question involved here is narrowed to a single issue, of whether or not the plaintiff should have gone into the chancery court and asked a reformation of the policy of insurance, and a decree there.

One of the earliest cases on the question of reformation in this state is that of the *Phoenix Fire Insurance Company v. Hoffheimer*, 46 Miss. 645. This was a bill asking for a reformation, and this is the thing that should have been done in this case.

Counsel, in their brief, cite the case of *Wulson v. Farmer's Mutual Insurance Company*, 156 Michigan, but this case is not an authority here, unless, by inference, it sustains the view which we take. The question in the *Wilson* case was of estoppel to deny that certain personal property was covered by the policy because moved from the barn in which it was originally insured, and by

which it was described in the policy. There is no such question involved here.

The case of *Hatch v. New Zealand Insurance Company*, 67 Cal. 122, is also cited by the appellant, and relied upon as authority. In that case the property insured was described as "Overland and free warehouse No. 1, and described as located on the northeast corner of Third and King streets in San Francisco. The proof showed that the warehouse was not No. 1, but No. 2, but that its location was correctly stated. The court properly held that the addition of the words "No. 1" was a mere surplusage, and would be disregarded, and the description of the property amply sufficient to identify it. There is no question involved here of accuracy of description in the sense that the property can be identified, it is simply a case of insuring one house and its contents, and when the policy is written, by the terms of the contract, insuring an entirely different piece of property. In the case of the *Phoenix Insurance Company v. Giebhart*, 32 Neb. 144, personal property was insured, and suit was brought by this company against the assured for the premium, but payment was resisted upon the ground that the property described in the insurance policy was not properly described, it being located in the wrong section, and the contention was made for that reason the policy was void. The court properly held that this was no defence to the payment of the premium, as the policy was not void. So in the case at bar, it is not our contention that the policy is void, but simply a case where reformation is necessary before the contract with the parties can be enforced.

In the case of *Omaha Fire Insurance Company v. Dufolk*, 44 Neb. 241, the court seems to hold with the appellant, but that case cites no authority and simply follows the *Giebhart* case cited above. So far as I know, this is the only case which holds with the appellant on the proposition here involved. The case of *Doherty v.*

Insurance Company, 67 Mo. 526, is also cited. That case, in my judgment, throws no light on the question involved here, for there the question was one of representation in the application by the assured for insurance. It was represented in the application that the assured had held a fee simple title to the property insured, the application alleging that the house was located in section 8. The proof showed this to be true, but also showed that the assured owned land in section 7, which adjoined the house, and that two and a half acres in section 8 had been donated to church purposes? The court held that the allegation that the property insured was in section 8, and the fact that two and a half acres had been donated to church purposes was entirely immaterial. There was no question of a reformation of the description of the house as being in the wrong company.

In the case of *Preizer v. Exchange Mutual Insurance Company*, 6 Wis. 89, cited by the counsel for appellant, the application located the mill property which was insured in the N. E. $\frac{1}{4}$ of section 8; the proof showed that it was in the S. W. $\frac{1}{4}$ of section 8, and the court took judicial knowledge of the fact that these quarter sections would necessarily be close to the point mentioned in the application. It was contended that the correctness of description of the property in the application was a condition precedent, and had to be complied with, or the policy void. The court held that this was not true, and the policy was not void, because the statement in the application was an immaterial one. There was no question of reformation of the policy involved.

In the case of *Landers v. Cooper*, 22 N. E. 212, is directly in point, and was decided by the court of appeals in New York in 1889. In that case the court held that evidence that the building described in the policy of insurance is not the one intended by the assured, is not admissible in an action of law on the policy.

Of course, we concede that if it would be proper upon the trial of this case for the court to permit proof to be introduced to show that, while the property was described as in section 11, in truth and in fact it was in an entirely different section, and that the property intended to be insured was not correctly described in the contract, then of course this demurrer should not have been sustained.

The fact that the property is described as being one mile from the town of Shivers does not aid the matter, because the court would take judicial knowledge of the fact that section 2 is immediately north of section 11, and the two sections could in fact be approximately the same distance from this village.

The counsel for the appellant contend that that part of the description in the policy, which locates the property in section 11, T. 9, R. 2 west, county of Simpson, one mile from Shivers, Mississippi, or the erroneous description of the location of the property, may be entirely disregarded, and there is then sufficient description of the property upon which to base a recovery. For this reason, they contend that the misdescription is immaterial, and might be regarded as surplusage. The counsel is mistaken in this, for the reason that there is no descriptive clause in the policy other than that which they state in their declaration to be a mistake. The property in the policy is not even referred to as the residence or dwelling-house of the assured. If so described, it would of course be an identification of the property, but the property is simply described as "dwelling-house" without saying that it is the dwelling-house of the assured or whose dwelling-house it is, or in any way designating it, except by locating it in section 11, when in fact the declaration says it is in section 2.

We respectfully submit to the court that the demurrer was properly sustained, and the proper procedure would be for the appellant to file his bill in the chancery court

of the county of his residence, asking for a reformation and a decree, instead of insisting that a court of law would have a right to permit evidence to be introduced varying the terms of the written contract upon which his action is based.

Argued orally by *R. L. Hilton*, for appellant.

ANDERSON, J., delivered the opinion of the court.

The appellee, the Farmers' Mutual Fire Insurance Company, entered into a contract of insurance with appellant, W. D. Shivers, by the terms of which it insured his dwelling house and household furniture in the sum of seven hundred dollars against loss by fire. The property insured was destroyed by fire, and on appellee's failure to pay the loss claimed appellant brought this suit. To the declaration appellee interposed a demurrer, which was by the court sustained, and the suit dismissed, from which judgment this appeal is prosecuted.

The question presented by the declaration and demurrer is whether the policy is unenforceable in a court of law, because the property insured is therein described as being in section 11, etc., when in fact, as shown by the declaration, it was in section 2, just north of section 11. The policy of insurance is made an exhibit to the declaration. The averments of the declaration necessary to be set out are as follows:

"That heretofore, to-wit, the said defendant was, and still is, engaged in writing insurance against loss of property by fire, and was so engaged on the 16th day of October, 1909. On the said 16th day of October, 1909, a duly authorized agent of the defendant, to-wit, James M. May, came to the home of plaintiff, about one mile from Shivers, in Simpson county, state of Mississippi, and solicited the plaintiff to take a policy in the defendant company. At the request and solicitations of the said agent, James M. May, plaintiff did then and there

agree with the defendant to insure certain property, enumerated in policy No. 10962, which is made an exhibit hereto and part of this declaration. Plaintiff avers that the said agent, James M. May, of the defendant company, was, at the time that the application for insurance by plaintiff with the defendant was made, on the premises of plaintiff which is insured by said policy. The agent of the defendant saw the property, and knew exactly what property was being insured. Plaintiff avers that the agent, James M. May, did not require a formal application to be made by plaintiff, nor has plaintiff ever made formal application in writing, and there is therefore no formal written application with said policy, nor part of this policy; but the said agent, James M. May of defendant, made a memorandum of the property to be insured, and had the policy issued according to said memorandum. Plaintiff avers that by some inadvertence or mistake the location of the property insured was misdescribed, so far as its situation is concerned; that is to say, the policy issued describes the dwelling-house and other property insured by said policy as being located in section 11, township 9, range 20, when it should have been section 2, township 9, range 20. However, plaintiff avers that said misdescription as to the location and description of the property is immaterial, as it has no effect on the hazard of the risk, or the rate of the premium, or any other material right of the defendant. Plaintiff avers that the consideration of the contract of insurance, evidenced by policy No. 10962, which is attached hereto, is seventeen dollars and fifty cents; that on the 16th day of October, 1909, the defendant, for and in the consideration of the said seventeen dollars and fifty cents, paid the defendant by the plaintiff, issued the said policy No. 10962, insuring the property of plaintiff described in said policy No. 10962 for a period of three years—that is to say, from the

16th day of October, 1909, to the 16th day of October, 1912.”

The property insured is described in the policy thus:

“To an amount not exceeding seven hundred dollars, on the following described property, while located and contained as described herein, and not elsewhere, to-wit:

On dwelling house	\$400.00
On household and kitchen furniture therein ..	100.00
On beds and bedding therein	75.00
On wearing apparel therein	25.00
On sewing machine therein	15.00
On silver plate and plated ware therein	10.00
On printed books and engravings therein	5.00
On organ therein	25.00
On smoke house	20.00
On provisions therein	25.00

— located in ——— civil district of ——— county,
— miles ——— from ———, section 11, town-
ship 9, range 20 west, county of Simpson, one mile from
Shivers, Mississippi.

“Reference Clause.—Reference being had to assured’s application No. 10962, which is hereby made a part of this policy, and a warranty on the part of the assured.”

Paragraph 8 of the policy provides, among other things: “This entire policy shall be void if the assured has concealed or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof.”

Appellant’s contention is that the error in describing the property insured as being in section 11, instead of section 2, is immaterial, because there is sufficient left in the policy after rejecting this erroneous description to identify the situation of the property insured. On the other hand, appellee contends that it was an error material to the risk, and appellant’s only remedy is by

a bill in chancery to reform the policy and enforce it as reformed.

One of the fundamental rulings governing the construction of such policies is that they are to be construed most strongly in favor of the insured. *Boyd v. Insurance Company*, 75 Miss. 47, 21 South. 708. And another rule is that: "The language of the policy, being chosen by the insurer, it should be construed, if practicable, so as to cover the subject-matter intended to be covered. A portion of the description which is false may be disregarded, if enough remains to identify the property." The contract of indemnity will be supported, if possible. 19 Cyc. 664. The policy under consideration, in addition to describing the property as being located in section 11, etc., further describes it as being in Simpson county, one mile from Shivers, consisting of a dwelling-house and household furniture, setting out specifically each class of furniture.

In *Phoenix Insurance Company v. Gebhart*, 32 Neb. 144, 49 N. W. 333, the property insured was grain, hay, and stock, situated on section 5, township 15, range 19, when, in fact, it was situated on section 5, township 15, range 18. The court said: "The precise question here involved was before this court in *State Ins. Co. v. Schreck*, 27 Neb. 527, 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. Rep. 696, and it was held that the variance was not material. The agreement in a policy is to insure certain property of a party, such as the house in which he and his family reside, a barn on his farm, and a warehouse for the storage of produce, or, as in this case, certain personal property. A misdescription of the land on which any of these are situated will not defeat a recovery in the case of loss by fire, because the court looks at the real contract of the parties, which was to insure certain property of the policy holder. The fact that such property was on a particular section, as section 16, instead of 17, cannot, of itself, affect the risk, and

would not render the policy void. The defense, therefore, wholly fails."

In *Omaha Fire Ins. Co. v. Dufek*, 44 Neb. 241, 62 N. W. 465, the property insured was broom corn, described in the policy as being in one township, when in fact it was in another. It was contended that the insured's remedy was in a court of equity to reform the policy. The court said: "The contentions of plaintiff in error with reference to the necessity of a reformation of the policy precedent to bringing suit and the alleged fatal effect of the misdescription noted are fully met by the following language quoted from *Phoenix Ins. Co. v. Gebhart*, 32 Neb. 144, 49 N. W. 333, *supra*.

In *Hatch v. New Zealand Ins. Co.*, 67 Cal. 122, 7 Pac. 411, the property insured was a warehouse described in the policy, "Overland free warehouse No. 1, situate at the northeast corner of Third and Keys streets, San Francisco," when in fact, the property described was "Overland Free Warehouse No. 2," instead of "No. 1." The court held that, that part of the description designating it as warehouse "No. 1" should be rejected as false. The court said: "It appearing by the proof of the actual condition of the property that the description 'No. 1 was false,' and that the remaining description of the property sufficiently identified it, the false part should be rejected. We know no reason why this rule does not apply to a description of property in a policy of insurance, as well as to a description of property in a conveyance."

In *Prieger v. Exchange Mutual Ins. Co.*, 6 Wis. 89, the property insured was a paper mill, described as "Prieger's Paper Mill, situated northeast quarter of section 26, township 7, range 21," while the fact was it was situated on the southwest quarter of section 25. The court said: "It is supposed that the court will take judicial notice of the relative situation of the sections and quarter sections of land according to government survey; and that the southwest quarter of section 25 cor-

ners upon the northeast quarter of section 26, and that if the water to propel the mill was actually upon the corner of the southwest quarter of section 25, it could not in any degree be material to the risk. Besides, the testimony of Kluppack shows, if there was an error or mistake herein, it was the fault of the agent of the company, and not of the plaintiff. But it is entirely immaterial."

To the same effect is *Dougherty v. German American Ins. Co.*, 67 Mo. App. 526.

The location of the property insured is an essential element in the description, and, if its locality is erroneously described, this will void the policy. But if, rejecting such erroneous description, there is sufficient left in the policy to point out the property intended to be insured, this is sufficient. It is true parol evidence is not admissible to so extend the terms of the policy as to cover property not intended in the description, "but it may be received for the purpose of applying the description to the property intended to be described." 19 Cyc. 670.

The court takes judicial notice of the fact that section 2 adjoins section 11 on the north; and in addition to this there is sufficient in the policy pointing out the property insured to authorize parol evidence identifying the property destroyed as that insured.

Counsel for appellee rely on *Landers v. Cooper*, 115 N. Y. 279, 22 N. E. 212, 5 L. R. A. 638, 12 Am. St. Rep. 801, and *Martin v. Farmers' Insurance Co.*, 84 Iowa 516, 51 N. W. 29. Those cases do not sustain their contention. They are cases in which the erroneous description of the property could not be rejected and leave in the policy a sufficiency of description to point out the property intended. There was not enough in the policies in those cases describing the property insured to authorize the admission of parol testimony applying such description to the property intended.

Reversed and remanded.

99 Miss.]

Brief for appellant.

CHARLES F. WOFFORD v. STATE.

[56 South. 162.]

CRIMINAL LAW. *Instructions. Weight of evidence.*

An instruction that, "if the jury believe that any witness has testified falsely in the case to any material matter, they have a right to reject all of the testimony of such witness, if they see proper," is erroneous in omitting the qualifying clause that the false swearing must have been intentionally and corruptly done.

APPEAL from the circuit court Chickasaw county.

HON. JOHN H. MITCHELL, Judge.

Charles. F. Wofford was convicted of manslaughter and appeals.

The facts are as follows:

On appeal accused assigns as error the granting of instruction No. 4 asked by the state, which is as follows: "No. 4. The court charges the jury that they have a right, in passing on the weight of the evidence of any witness, to take into consideration the interest the witness may have in the case, one way or the other, if any is shown; and in this case, if they believe that any witness has testified falsely to any material matter, they have a right to reject all of the testimony of said witness, if they see proper."

Joe H. Ford, for appellant.

The first error I notice is the giving of instruction No. 4 on part of the state. That instruction reads as follows:

"The court charges the jury that they have a right, in passing on the weight of the evidence of any witness, to take into consideration the interest the witness may have in the case, one way or the other, if any is shown, and in this case, if they believe that any witness has

testified falsely to any material matter, they have a right to reject all of the testimony of said witness if they see proper.

This instruction has always been condemned by this court. It invokes the rule or maxim "*falsus in uno, falsus in omnibus*," and fails to submit to the consideration of the jury, all the elements that make up the rule of law on the subject. The draftsman failed to tell the jury that the witness has "willfully and corruptly" sworn falsely as to a material fact. As said by this court, in *White v. State*, 52 Miss. 227, "The false swearing must be willful. The prayer does not exclude the idea of mistake or misconception." *White v. State*, 52 Miss. 216. This doctrine was in substance supported by the court in *Finlay v. Hunt*, 56 Miss. 22. This identical instruction was condemned by this court in *Vicksburg, etc., R. Co. v. Herrick*, 62 Miss. 28, in the following language:

"The second instruction given for the plaintiff is erroneous. The maxim of *falsus in uno, falsus in omnibus* cannot be invoked except where the witness has intentionally given false testimony." In *Sardis & D. R. Co. v. McCoy*, 85 Miss. 391, 37 So. 706, this court said as to an instruction almost exactly like the one here: "We again announce that where jurors are instructed as to their right to reject the testimony of witnesses on the ground that they have sworn falsely to any part of their testimony, the instruction should always contain the limitation that such false swearing was 'willfully, knowingly and corruptly' done. The instruction under review does not contain this necessary qualification."

This same doctrine is positively recognized and adhered to in the following cases from this court: *Davis v. State*, 89 Miss. 119, 42 So. 541; *Bell v. State*, 90 Miss. 104, 43 So. 84; *Turner v. State*, 50 So. 629; *Waldron v. State*, 54 So. 66; *Riley v. State*, 75 Miss. 352.

Other eminent authorities which unqualifiedly condemn this instruction are 30 Amer. & Eng. Ency. Law (2d Ed.), p. 1072, substitute "*falsus in uno, falsus in omnibus*" and many decisions cited. Vol. 1, sec. 254, Blashfield's Instructions to Juries and the long list of cases cited in the notes; Wigmore on Evidence, secs. 1008 to 1015.

James R. McDowell, assistant attorney-general, for appellee.

The fourth instruction would, under ordinary circumstances, in my judgment, be erroneous, because of the omission of the words, "knowingly; willfully or corruptly," or words similar. It is hard, however, to conceive that the jury were misguided in this particular case, though our court has always, where facts are disputed, held, that an instruction on the doctrine of "*falsus in uno, falsus in omnibus*" should contain the words here omitted. The *Waldrop case*, 54 So. Rep. 66, may save this instruction. I submit the question to the court.

SMITH, J., delivered the opinion of the court.

The fourth instruction, granted by the court at the request of the state, is erroneous. It omits the qualifying clause that the false swearing must have been intentionally and corruptly done. *White v. State*, 52 Miss. 216; *Railroad Company v. Hedrick*, 62 Miss. 28; *Railroad Co. v. McCoy*, 85 Miss. 391, 37 South. 706; *Davis v. State*, 89 Miss. 119, 42 South. 541; *Bell v. State*, 90 Miss. 104, 43 South. 84; *Turner v. State*, 95 Miss. 879, 50 South. 629; *Waldrop v. State*, 54 South. 66.

Reversed and remanded.

WILLIAM FOERSTER & COMPANY v. FAULK-CHRISTIAN
LUMBER COMPANY.

[56 South. 162.]

CONTRACTS OF SALE. *Stipulations. Waiver.*

Where in a contract for the sale of lumber to a buyer employed in exporting lumber, there was a provision that "shipments to the buyer should be made as steamer room for desired ports becomes available." *Held*, that this provision was for the benefit of the buyer and could be waived by him, and where so waived the seller was not excused from delivering the lumber by showing that the buyer had not advised him that steamer room had been obtained.

APPEAL from the circuit court of Greene county.

HON. JOHN L. BUCKLEY, Judge.

The facts are sufficiently stated in the opinion of the court.

Rich & Hamilton, for appellants.

It was contended below that the phrase in the contract, "shipment to be made as steamer room for the desired ports becomes available" was a condition precedent and that the evidence did not show that such a condition had ever existed, or that any of the demands upon the defendant had ever showed such a condition, and that there was no duty on defendant's part to deliver except upon the existence of such condition.

The reply to this is obvious. The immediately following sentence provides: "Terms of payment net cash, eighty per cent of the value of each monthly production to be paid on the first of each month by sight draft on us. You are to attach to the draft specifications showing the amount of each monthly production against which the above stated advance is made, the remaining twenty per cent we are to pay at time of shipment."

Therefore, it could not be for the benefit of the defendant as twenty per cent of its production was not to be paid for until shipment was made, and of course the sooner the shipment was made the sooner would the defendant get this twenty per cent, the result being that, instead of being a condition precedent for its advantage, it was really to its disadvantage. It was manifestly intended for the benefit of the buyer, who by not being required to immediately order the monthly production of defendant, and having the privilege of waiting until shipping room became available, would be saved the expense of storage and unnecessary handling at Mobile.

This is obvious, but a somewhat similar case may be mentioned, being *Neill v. Whitford*, 18 Com. Bench (N. S.) 435, where there was a sale of cotton, the phrase in the contract being, "the cotton should be taken from the quay;" it was contended by the buyer, who therefore refused to accept the goods, that it was a condition precedent; but the court held, that it was a stipulation for the benefit of the seller only and to prevent his having to pay charges, and it was not a condition precedent. This case was affirmed in the Exchequer Chamber (1 Com. Pl. [L. R.] 685).

A similar principle was announced in *Harrison v. Fortlage*, 161 U. S. 57, top of page 64, where a provision was held not a condition of the contract, but merely a provision for the benefit of the seller.

Furthermore, it is to be noted that, where any doubt is possible the construction by the parties controls (*Ramsey v. Brown*, 77 Miss. 124), and the construction here was that at no time was any such question raised, the question would seem therefore to be foreclosed entirely.

Furthermore, whether for the benefit of the plaintiffs as buyers or not, it is certain, under the authorities, that no indefiniteness as to time of delivery, so as to affect the contract, existed. The law is thoroughly settled, that such a provision cannot postpone the performance of the

contract indefinitely, but that the law itself implies the limitation that it shall be reasonable, which implication is based upon the manifest intent of the parties. For instance: In the case at bar, where the plaintiffs were to pay eighty per cent of the preceding monthly production, they certainly expected not to lose the goods upon which they had advanced this money; on the other hand, the defendant, as seller, certainly did not expect to lose the balance of twenty per cent due him therefor; nor could he reasonably expect to hold the eighty per cent payment and also the goods. Manifestly they intended that such deliveries should be made at some time, and, although a reasonable margin was allowed for the convenience of one or the other (we insist for the buyer), yet there was intended a limit, which would be whatever was a reasonable time under the circumstances.

The law is well stated in the leading case in 19 Wall., p. 560, 562, where the provision was for payment "as soon as the crop can be sold, or the money raised from any other source." The court says:

"No time having been specified within which the crop should be sold, or the money raised otherwise, the law annexed as an incident that one of the other should be done within a reasonable time, and that the sum admitted to be due should be paid accordingly. Payment was not conditional to the extent of depending wholly and finally upon the alternative mentioned. The stipulation secured to the defendants a reasonable amount of time in which to procure in one mode or another the means necessary to meet the liability. Upon the occurrence of either of the events named, or the lapse of such time, the debt became due, it could not have been the intention of the parties that, if the crop were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such result would be a mockery of justice."

This case was followed in this state in the case of *Randall v. Johnson*, 59 Miss. 317, where money was to be paid ninety days after schooner's first return trip; she was lost at sea, and it has held, quoting the last sentence of the preceding case, that a contrary holding would be a "mockery of justice," that her return was not an absolute condition precedent, and that the money was due ninety days after the expiration of the period required for her return trip.

In the note to this Mississippi case, as reported in 42 American Reports 365, a number of cases are cited and commented upon, the result reached by the annotator being that it is clear that a payment at all hazards is to be made within a reasonable time.

In Alabama, in *Byrne Mill Co. v. Robertson*, 149 Ala. 273, where payment was to be made as the lumber was loaded on cars at Mobile, it was held that the time of payment was not indefinite, that it was for the benefit of the plaintiff, and if not, yet in any event that the law implied a reasonable time.

Similarly, in *Culver v. Caldwell*, Admr., 137 Ala. 125, 132, where the contract was for the defendant to "refund as fast as he could spare from his salary," the court held, that the contract was not void for uncertainty, that what was meant was merely that he had a reasonable time to acquire money from the expected source and that he was not relieved of the obligation in case he found it inconvenient to spare it; and it was held valid accordingly.

To the same effect is *Hicks v. Shower*, 3 B. Mon. 483, where the provision was to pay as soon as a house could be sold.

In *Crass v. Scruggs & Co.*, 115 Ala. 264, a similar doctrine as to reasonable time was announced.

In *Lewis v. Tipton*, 10 Ohio State 88, paper payable "when I can make it convenient," it was held due after reasonable time.

In *Noyes v. Barnard*, 63 Fed. 782, the circuit court of appeals for the ninth circuit held that a commission payable on a basis of sales of land, the time when and terms of which were to be in defendant's hands, the law implied a reasonable time.

In *Hood v. Hampton, etc., Co.*, 106 Fed. 408, the same doctrine was announced.

So in *Smithers v. Junker*, 41 Fed. 101, a note contained the promise to pay two thousand and forty-eight and no one-hundredths dollars "payable at my convenience and upon this condition, that I am to be the sole judge of such convenience and time of payment;" held that, nevertheless, it was due after a reasonable time.

Among the above authorities will be found cited by the court other cases.

A case directly in point is that of *Whiting v. Gray*, 8 So. 726, 27 Fla. 488, which was a case where the defendant was to deliver the lumber, commencing July 10th, or as soon thereafter as a vessel can be ready, and the suit was by the buyer for failure on the part of the seller to deliver, and the seller by plea set up that "no time was fixed in the contract for chartering a vessel to transport the lumber to be delivered by the defendant; that the plaintiff was bound by the contract to charter a vessel in a reasonable time, which plaintiff did not do," and adds further, that the defendant cut the lumber according to contract and was ready and offered to deliver it, but the plaintiff would not receive it within a reasonable time. This plea was demurred to and the court below overruled the demurrer. The contention of the plaintiff's counsel was, that although when time for performance is not specified, the law implies a reasonable time, yet that the parties in that case had fixed the time without reference to reasonableness. The supreme court, however, held, to the contrary, per Raney, C. J., saying:

"The obligation of the plaintiff was to have a vessel ready as soon as he could, and it was understood by the parties he had to charter her; and this means nothing more than that, as he did not then have a vessel, he was still to have her ready within such time as would be a reasonable time for chartering one and getting her ready to receive the cargo; or, in other words, to have her ready in what, under the circumstances, or considering that the plaintiff had to charter one, would be a reasonable time," and the judgment was affirmed accordingly.

This case, we submit, shows conclusively that applying the principle to the case at bar, the meaning of the phrase, "shipments to be made as steamer room for the desired ports becomes available," did not mean an indefinite or uncertain length of time, but it meant that such shipments were to be made within a reasonable time, and that the duty was on the plaintiff to secure within a reasonable time available steamer room, failing which, at the expiration of such reasonable time, there would be a violation of the contract, of which the defendant, or seller, could avail himself by suit, or otherwise, as the case might be.

Of consequence, we submit that uniformly under the authorities, this provision in the contract under discussion was not an indefinite and void provision, but was a very definite and certain provision, which would in the proper contingency, if breached by plaintiffs, constitute a ground of action by the defendant.

Gex & Harrison, for appellees.

An inspection of the contract will show the following facts:

The appellee was the owner of a small sawmill in Green county, Mississippi, and as such manufacturers of the grades of lumber as set out in the letter in the pleadings which forms the basis of the contract. That the appel-

lants were what are known as export brokers, whose chief occupation is to buy lumber in this country and make sales thereof in foreign countries, they were not shippers in the general acceptance of that term, but they purchase "room" or space on outgoing vessels for the shipment of whatever lumber they could purchase from time to time when room is available and transportation rates such as to allow a profit on the shipment.

The parties being fully aware of the conditions and circumstances surrounding both of them entered into the contract, which as we view it, if any other results could be reached, but those found by the lower court, was purely a gambling contract on the part of the appellant with the usual terms of such contracts as far as the appellant was concerned of "heads I win, tails you lose."

The appellant had ample protection against loss, and by the provisions of the contract, if the appellee failed to make deliveries at the time it had a right to demand such deliveries, to-wit:

"As steamer room for the desired points became available" and if at that time the appellee had not made deliveries, then the appellant could have purchased the lumber provided by the contract for account of appellee and charged appellee with the difference between the contract price and the price he would have paid for same on the market; but it had no greater rights and if no steamer room became available, as it is clearly shown by implication from the evidence, then the appellants were not damaged and cannot recover, the lumber having been bought for a specific purpose to permit it, the appellant, to charge the appellee the difference between the market price (at an arbitrary time) and the contract price, though it is shown it never sustained any loss, is to us manifestly unfair, and is not supported by any principle of law that we know of.

The appellee was to sell to appellant a certain amount of lumber as it manufactured same; the appellant was

to purchase that lumber for the specific purpose of export "as steamer room was available." Steamer room to this date not having become available, appellant has sustained no damages, no more so than could the appellee if the market had gone down sued for the difference between the contract price and the market price, though he had never manufactured a foot of the lumber. His was not a contract for the sale of futures in lumber, but for actual delivery of the goods to appellants "when he could obtain shipping room on vessels," and it never having obtained shipping room, it was not damaged.

We do not dispute appellant's law, because it is not applicable to the real issue on which the peremptory instruction was granted.

SMITH, J., delivered the opinion of the court.

Appellants are engaged in the lumber export business in the city of Mobile, Alabama, and appellee owns and operates a sawmill at Leakesville, Miss. On October 13, 1904, a contract for the purchase of lumber by appellant from appellee was entered into by them; it being in the form of a letter addressed by appellants to appellee and by appellee accepted. This contract, among other things, contains the following stipulation: "Shipments to be made as steamer room for the desired ports becomes available." All of the lumber purchased by appellants under the contract not having been delivered, suit was instituted against appellee for the recovery of the damages alleged to have been sustained by appellants by reason thereof. The evidence introduced on behalf of appellants was excluded by the court, and a verdict directed for appellee. It is contended here by counsel for appellee that appellee was under no obligation to make any shipment of lumber until it had been advised that appellants had obtained steamer room for same, that no such advice was ever given to appellee, and consequently appellee was never placed in default. This provision of

the contract was for the benefit of appellants, which, of course, could be, and under the evidence was, waived by them.

The judgment of the court below is therefore reversed, and the cause remanded. *Reversed and remanded.*

T. C. BUFORD v. STATE.

[56 South. 162.]

1. CRIMINAL LAW. *Hearsay evidence. False pretenses. Instructions.*

Where on the trial of accused for obtaining money under false pretenses by representing himself to be the agent of an adjusting company, the issue was whether or not he had been discharged by the company before the occurrence of the transaction complained of. It was error to allow the superintendent of agents of the company to testify that the books of the company showed that accused had been discharged several months before the date of the alleged offense, he having no personal knowledge of the fact, this testimony was hearsay.

2. EVIDENCE. *Criminal intent. Good faith.*

Where accused was charged with obtaining money under false pretenses by contracting in the name of a company and obtaining money thereon and by representing himself as the agent of such company and the issue was whether or not he had been previously discharged by the company. It was error for the court to refuse him an instruction that even though he was not in the employ of the company at the time of making the contract, but was ignorant of the fact that he had been discharged and acted in good faith in making the contract and obtaining the money, then he was not guilty of the crime charged.

APPEAL from the circuit court of Wilkinson county.
HON. M. H. WILKINSON, Judge.

T. C. Buford was convicted of obtaining money under false pretenses and appeals.

Jones & Ventress, for appellant.

As to the third instruction we can only say that we were amazed at its refusal. This instruction asked the court to charge the jury that the discharge of subordinate agent by a superior agent, who had the right to discharge him, could not be proved in this case by the written report of the superior agent to the principal. If this is not sound law and applicable to this case, what is it? The witness, Joy, testified in answer to the question, "Do you know that Mr. Burford was discharged by your company?" he said, "all I know is through notice from the assistant district manager." The report itself would have been hearsay, and inadmissible, but oral testimony to the existence of the report and its contents was hearsay to the second power (thus hearsay). Surely this instruction was erroneously refused.

We respectfully submit that the fourth instruction should have been given, it had been proved both by the state and by the defendant that the latter had been the agent of the consolidated adjustment company at one time, and the issue was made as to whether or not he was still the agent when the contract with Briscoe was made, or whether he had been discharged; and if he had been discharged, whether or not he had any notice of it. This put in question defendant's good or bad faith in dealing with Briscoe, and consequently his guilt or innocence.

Evidence had been introduced in favor of both contentions. We submit, therefore, that this instruction is based upon sound principles of law, supported by the authorities already cited, and that it is germane to the facts of the case and that its refusal by the court was error.

James R. McDowell, assistant attorney-general.

This appellant is convicted of obtaining money under false pretenses. The record itself is the strongest brief

the state could offer. The proof shows that the appellant did make representations to witness Briscoe that he was agent of the consolidated adjustment company, and by virtue of such representations obtained money from Briscoe. The question here to be decided is whether such representations were false and fraudulent, and whether, at the time, appellant knew they were untrue, and knew that he did not represent the adjustment company. The jury had the proof before them, and were given the benefit of instruction covering this very point. I call special attention to instruction given for the state.

The jury determined that he was guilty, thereby indicating that they believed that defendant made a false representation of his agency in order to obtain this money, and that at the time that he made this representation, he knew that it was false and fraudulent, and that he did not represent the adjustment company.

Efforts to reverse the case on the facts must fail as the jury settled the disputed facts against appellant. His whole defense seems to be that he thought he still represented the adjustment company, and that his dealings with Briscoe were as an agent of said company, and that he did not know that he had been discharged. Mr. Joy, the company's superintendent of agents, testified that his records show that appellant and Van Hook, a deputy district manager, had both been discharged in October, whereas the crime here is laid in February. It is objected that this is hearsay evidence. Certainly the records and other documents of a corporation are admissible to show who are and who are not its employees.

Counsel raises objections to the refusal of a number of instructions asked for by him. I submit that a reading of the instructions given by the court is sufficient answer to appellant's contention. Every defense which he is entitled to is covered by instructions given. A reading of the instructions refused him show that they are either

a repetition or unsound law, or not based upon the facts. The jury are told that they must believe beyond a reasonable doubt that the defendant not only falsely and fraudulently made these representations in order to obtain this money, but that he knew at the time he made them, that they were false. What more could defendant ask? This is all he claimed. His whole defense was that it was innocently done; that he did not know that he had been discharged. The jury decided that he did know it. If their verdict is to be disturbed, what protection has the public against such "skin-game" artists, who go around the country obtaining their money under false and fraudulent representations? If guilty, a defendant would deny that guilt. The jury decided he was guilty on the proof. It is for the jury to say whether they believed the defendant had knowledge of the falseness of the representations made by him. I take it that it is useless to enter into argument as to instructions refused appellant. No doubt an answer at once suggests itself to the court when these instructions are read, and it would be a waste of time and argument to show to the court that they were properly refused.

WHITFIELD, C.

The testimony delivered by Mr. Joy as to the discharge of the defendant we do not think competent on the testimony in this record. It was very easy to have proved that discharge by the records of the company, or by Mr. Smith or Mr. Van Hook, or any proper agent of the company, who had personal knowledge of the fact of such discharge. It is obvious that Mr. Joy's testimony on that subject was wholly hearsay. Whether or not the appellant had been discharged at the time he had his dealings with Mr. Briscoe was the vital point in the case. The fourth instruction, asked by the defendant and refused, should therefore have been given.

The defense was in substance, first, that the defendant had not been discharged as a fact; and, second, that, if he had been, he had not been notified of such discharge, and honestly believed he was still the agent, and acted in perfect good faith, then he was not guilty as charged. On this last proposition, the court refused, for the defense, charge No. 3, which is as follows: "If the jury believe from the evidence that the defendant was in the employ of the Consolidated Adjustment Company on May 9, 1910, under a contract for employment made with one of their agents, Van Hook by name, and that as such agent he made a contract with B. T. Briscoe in accordance with the rules and regulations of said company, in consideration of which he received eighty-seven dollars and seventy-five cents from said Briscoe, and that said contract was made in good faith, he is not guilty of any criminal act, even though, at the time of making said contract, he was not in the employ of said company, but was ignorant of that fact." We think, on the facts in this case, this charge, also, should have been given.

We notice no other assignments of error than those specified.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court; and, for the reasons therein set out, the case is reversed and remanded.

STATE v. JOHN HUBANKS ET AL.

[56 South. 163.]

CRIMINAL LAW. *False pretences. Indictment. Requisites.*

An indictment for obtaining money under false pretenses under Code 1906, section 1166, charging that accused intending to cheat an insurer and the beneficiary in a life insurance policy, fraudulently pretended to the insurer that he was the beneficiary in the policy and that insured was dead, by means of which he obtained from insurer three hundred dollars and further charging that the policy was not the property of accused and that he was not the beneficiary therein named, and that insured was not dead, is fatally defective in failing to charge the ownership of the money obtained and in failing to charge that the beneficiary in the policy had not transferred or assigned it to accused.

APPEAL from the circuit court of Sunflower county.

HON. J. C. WARD, Special Judge.

John Hubanks and others were indicted for obtaining money under false pretenses. From a judgment sustaining a demurrer to the indictment the state appeals.

The facts are as follows:

Defendants were indicted under section 1166 of the Code of 1906, which is as follows: "Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding three years, or in the county jail not exceeding one year, and by fine not exceeding three times the value of the money, property, or thing obtained."

The indictment, to which a demurrer was filed, omitting formal parts, charges that the defendant "unlaw-

Statement of the case.

[99 Miss.]

fully and feloniously devising and designedly intending to cheat and defraud the International Order of Twelve of Knights and Daughters of Tabor, a corporation, and one Isaac Cook and one Manuel Potts having then and there a certain life insurance policy heretofore issued by the said corporation upon the life of one Piley Cook, which said policy was then in full force and effect and binding upon the said corporation and the said Piley Cook, and by which said policy the said corporation agreed and became bound to pay to the beneficiaries named therein, to-wit, Isaac Cook and Manuel Potts, three hundred dollars in money upon the death of the said Piley Cook, a more particular description of the said insurance policy being to the grand jurors unknown, did then and there unlawfully, feloniously, falsely, designedly, and fraudulently pretend to the said corporation that the said policy was the property of the said Hubanks, and that the said Hubanks was the beneficiary named in the said policy, and by virtue of a false token in writing, called a proof of death, did then and there unlawfully, feloniously, falsely, designedly and fraudulently pretend to the said corporation that the said Piley Cook was dead and the said sum of three hundred dollars was due and payable by the said corporation to the said Hubanks by reason of the terms of the said policy and of the death of the said Piley Cook and of the said proof of loss, a more particular description of the said proof of loss being to the grand jurors unknown, by means of which said false pretenses they, the said Hattie Clarke, John Hubanks, and J. E. Walker, did then and there unlawfully, feloniously, falsely, designedly, and fraudulently obtain of and from the said corporation three hundred dollars in money, of the value of three hundred dollars; whereas, in truth and in fact, the said policy was not the property of the said Hubanks, and the said Hubanks was not the beneficiary named in the said policy, and the said Piley Cook was not

dead, but was then living, and the said sum of three hundred dollars was not due and payable by the said corporation to the said Hubanks by reason of the terms of said policy, and by reason of the death of the said Piley Cook, and by reason of said proof of loss, all of which they, the said Hattie Clarke, John Hubanks, and J. E. Walker, then and there well knew, against the peace and dignity of the state of Mississippi."

James R. McDowell, assistant attorney-general, for appellant.

The ninth ground of error is predicated upon the fact that the indictment does not show that the money was the property of the corporation. This is a matter of proof. Being in the possession of the prosecution from whom the defendant obtained it is *prima facie* evidence of his ownership, but it is not necessary to charge in the indictment that he was the owner. The gist of the offense is the false pretenses perpetrated upon the party from whose possession the property was obtained. It might frequently occur that ownership may be charged on one person when the title would be found to be in another. See 12 Am. and Eng. Ency. Law (2d Ed.), p. 828, note 1. The definition given by Mr. Bishop of false pretenses is as follows: "A false pretense is such a fraudulent representation of an existing or past fact by one who knows it is not true as is adapted to induce the person to whom it is made to part with something of value." The false pretenses, by means of which something of value is obtained from another in the gist of the offense, and the fact that the indictment charges that one obtains from another by means of false representation goods of value, sufficiently defines the crime, in the light of this definition and of our statute, and certainly puts the defendant on notice of what he is called

upon to defend. On the trial, of course, it is necessary to show that the property is that of another and not that of the defendant; but this is a matter of proof.

The demurrer on the 19th ground set up that the indictment fails to show that said life insurance policy was assigned or transferred to the defendants. This is not necessary. The state has nothing to do with any transfer from Cook and Potts to the defendants. This is a matter of defense, if it was transferred to the defendant, and Cook and Potts can set it up. The allegation is that the parties falsely represented that Hubanks was the beneficiary when he was not and they knew it when the representations were made.

With reference to any fraud being practiced upon Cook and Potts, that may be treated as surplusage, if it can be proven that the corporation was defrauded of the money by these false representations. The fact that the indictment charges that the corporation was defrauded, sufficiently states the offense.

Reading again the indictment in the light of Mr. Bishop in his *Directions and Forms* (2d Ed.), chapter 33, as to what should be set out in an indictment, I fail to agree that this indictment is fatally defective. It is true it could have been much more carefully worded and the offense more concisely charged, but I believe it fills the purpose which an indictment is designed to fill. An indictment is not proper if argumentative, and it is not necessary to set out matters which are only matters of proof. An indictment has a purpose, and when its form is sufficient to carry out that purpose, it should stand.

D. M. Quin, for appellees.

The ninth ground of demurrer is to the effect that the indictment does not show any loss to said corporation, nor that the money paid to the defendants was the money or property of said corporation. Counsel for the state says that this is a matter of proof. Counsel cites the

definition given by Bishop of False Pretenses. Bishop's New Criminal Procedure, sec. 173, subdivision 2, says: "The ownership must be averred, or a valid reason 'given for the omission.' Money sent by a husband to his wife for her support must be laid as his. A bailor is for the purposes of this averment, an owner, the same as in larceny." In the case at bar the indictment neither shows that the money is the property of said corporation, nor that it was in the hands of said corporation as bailor. Counsel cites 12th Am. and Eng. Ency. Law, note 1, p. 828. I call the court's attention to the text beginning on page 827 as follows:

"The ownership of property must be shown. This is necessary to exclude the fact of the defendant's having obtained his own goods or money, in which case there can be no offense unless the prosecuting witness has some special interest in the property. "The ownership of the property as obtained by false pretenses must be alleged distinctly. *State v. Blizzard*, 70 Md. 385. In the case of *Thomas v. People*, 24 Ill. 60, 76 Am. Dec. 733, it is said:

"The indictment contains two counts substantially alike, in both of which alleging that the defendant 'intending by unlawful means to get into his possession the choses in action, money, goods, wares and effects, and other valuable things of the people of this state,' etc., without any allegations it was the property of the person sought to be defrauded, which we hold essential in cases of this character. That person must be alleged to be the owner of the property out of which he was defrauded.

In the case of *State v. Blizzard*, 14 Am. St. Rep. 370, it is said: "The cases are numerous where it has been held that the omission to allege the ownership of the property was fatal to the sufficiency of the indictment, even after conviction." In 2d Bishop's Criminal Procedure, par. 184, subdivision 2, it is said: "Ownership

must be proven as laid." Evidently the allegation of ownership is a necessary allegation. In the recent Mississippi case, styled *Hampton v. State*, 54 So. 722, it is said: "The rules of law in cases of larceny, with reference to alleging and proving the ownership of the property charged to have been stolen, apply with equal force to the crimes of embezzlement, false pretenses and other kindred offenses." See, also, 23 Cent. Dig., subject False Pretenses, par. 44. In an information for obtaining money by reason of false pretenses, it is not sufficient that it may be gathered by inference from the allegations thereof that the ownership of the money was in some person therein named, but such ownership is a material fact and should be directly averred. *Moulie v. State*, 37 Fla. 321, 20 South. 554. "It is essential to the validity of an indictment for obtaining money by false pretenses, that the indictment should allege whose money was obtained." *Halley v. State*, 43 Ind. 509. I think these authorities sufficient to show that it is necessary to allege ownership in the indictment and not to rely on proving ownership strictly as a matter of proof as contended by counsel for the state. The only allegation in the indictment in the case at bar by which the pleader attempts to allege ownership is that the defendants did then and there unlawfully, feloniously, falsely, designedly and fraudulently obtain of and from the said corporation three hundred dollars." I submit that this allegation does not allege ownership, nor does it show that the money was not the property of the defendants.

I submit that it needs no citation of authorities to sustain the tenth ground of demurrer, because as suggested in the ninth ground, the ownership of the property should be alleged, and necessarily as suggested in the tenth ground, ownership of the property in the defendants should be negatived.

Counsel for the state jumps from the ninth to the nineteenth ground of demurrer, which latter ground I will

now consider. Whatever may be said of other grounds of the demurrer, I submit that at least the nineteenth ground is good and should be sustained. The nineteenth ground is as follows: "Because the indictment alleges that the beneficiaries named in said life insurance policy were Isaac Cook and Manwell Potts, and does neither show that said life insurance policy was assigned or transferred to the defendants or either of them, nor that it was negotiable, or payable by the said corporation when said life insurance policy was in the hands of, or was presented for payment by any one other than the beneficiaries named therein.

In the case *In re Schurman et al.*, reported in 20 Pa. Rep. 277, and which was a case for attempting to draw money on a life insurance policy, the insured not being dead, and the beneficiary named therein not being a party to the false pretense (very similar to the case at bar), the court says on page 281:

"It is not charged that any policy had been assigned, or that the beneficiary therein had been changed, nor yet, that the defendants had controlled the policy and intended to forge and assign or transfer the same. The pretenses are not alleged to have been brought to the attention of the beneficiary and there is no statement that it was intended to induce her to apply for the insurance money, either fraudulently or in good faith. It is not even stated that the false representations were made to the company, or any of its agents. The company could not be defrauded unless the beneficiary, or some one for her represented to it that he was dead and applied for the insurance. None of the defendants had any interest in the policy, or any right to demand the payment of same, even if the insured had been actually dead. The means stated to have been employed for the purpose of obtaining the money were of themselves futile and vain to accomplish the intended end. They were not adequate nor suitable for the purpose, nor were they such that

would apparently produce the desired result," and on page 282 it is said: "To charge the offense of obtaining money by false pretenses, the facts necessary to be established must be set out. As every promise or pretense is not criminal, those relied upon must be plainly alleged to enable the court to determine their indictable quality. The pretenses must be specifically negatived and it must be stated that they were made to some person to be injuriously affected by them and that upon the faith of such pretenses the money was obtained." "All of the steps taken and specifically alleged to have been intended would not have operated to defraud the company. If Reddington was injured, had died and had been buried, as was pretended, then so far as the information shows, there was still no apparent ability on the part of the defendants to commit the fraud." I submit to the court that the indictment in this case shows no assignment of the policy, no change of the beneficiaries and nothing which gave the defendants, or Hubanks the right to collect the money on the death of Piley Cook or any obligation arising against the said corporation to pay the defendants, or any one of them any money on the presentation of the proof of death or "proof of loss." In the case of *Woodbury v. State*, 69 Ala. 242, it is said: A false pretense to be indictable, must be calculated to deceive and defraud. As of an actionable misrepresentation, it must be of a material fact, on which the party to whom it is made has the right to rely; not the mere expression of an opinion, and not of facts open to his present observation, and in reference to which, if he observed, he could obtain correct knowledge."

In the case of *State v. Blizzard*, 70 Md. 385, and which was an indictment for obtaining a valuable security, to-wit: "A certain bill of sale, or mortgage of personal property for the payment of \$600.00," etc., the court says: "There is in the indictment before us manifestly great want of certainty and precision in the allegations

essential to constitute the crime. As will be observed, it is not shown by any averment in the indictment that the bill of sale or chattel mortgage (whichever it may be) was assigned or transferred to the defendant by the owner, or that anything passed to the defendant more than the mere paper-writing, without the least interest in the property embraced, or the money secured by the instrument." "It is a little difficult to say that an instrument such as that here described, without assignment or transfer, can be properly designated as a valuable security, of which a party has been deprived by false pretense, when nothing could pass to the defendant more than the paper upon which the instrument was written. The possession of the instrument by the defendant divested no right, nor did it invest the defendant with any right or power over the property or money secured by the instrument." "The indictment is radically defective in another particular, and that is, in its failure to allege distinctly the ownership of the property or securities obtained. It is settled by all authorities that it is no less requisite in indictments for obtaining by false pretenses that the ownership of the property or securities obtained should be distinctly alleged than it is that such averments should be made in indictments for larceny."

I therefore submit that in order for the defendants, or either of them, to be liable for money paid to Hubanks upon the presentation of a proof of death, or "proof of loss" on a life insurance policy issued by said corporation on the life of Pily Cook for the benefit of Isaac Cook and Manwell Potts, the indictment should allege a change of the beneficiaries in the policy, which change was obtained by false pretenses on the part of the defendants, or an assignment and transfer of the policy to the defendant, or some one of them, and the ownership of the policy and the money obtained.

Statement of the case.

[99 Miss.]

WHITFIELD, C.

The indictment in this case failed to charge the ownership of the money, the three hundred dollars, and also failed to charge that the beneficiaries in the policy had not transferred or assigned it to Hubanks. Both these allegations were essential in this indictment. See the authorities cited in the unusually able argument of counsel for appellee. *Affirmed.*

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein set out, the action of the court below is declared correct.

JAMES BRANDON v. STATE.

[56 South. 165.]

HOMICIDE. *Dying declarations. Preliminary proof.*

A statement is not admissible in evidence as a dying declaration in the absence of testimony showing that the deceased had abandoned all hope of recovery.

APPEAL from the circuit court of Chickasaw county.

HON. W. A. ROANE, Judge.

James Brandon was convicted of manslaughter and appeals.

The facts are as follows:

On the trial what purported to be the dying declaration of the deceased was admitted as evidence over the objection of the defendant. The deceased was shot on Saturday night. Two days later he made a statement to the sheriff about the killing. He died on the eighth or ninth day after the shooting, of pneumonia, which

was contracted about the sixth or seventh day after he was shot. At the time he was shot he was very drunk. The doctor called upon him constantly during his sickness, and the first few days he stated to the doctor "that he was afraid of death," and that "he believed he was going to die," and according to the doctor's testimony he was excited about his condition, and said "he didn't believe he would get well," or words to that effect. About this time he made the statement to the deputy sheriff, which was admitted as his dying declaration. The defendant objected, on the ground that this declaration does not come within the rule as it does not show that he was "in extremis," or in fear of impending dissolution.

A. T. Stovall, for appellant.

I understand the rule to be that the court must know beyond every reasonable doubt that the declarant recognized that he was "in extremis;" in other words, made the statement under a sense of impending dissolution; conscious of the approach of death at the time of making the statement, and of its certainty. In other words, there must be no hope of recovery, and no longer any temporal, self serving purpose to be furthered, as evidently there was in this case. The declarant was justifying himself to the officers. He never said that he realized that he was going to die; but on the contrary the officers testified that he didn't even express any anxiety while they were there. The only time he ever said anything about dying was to the Doctor, the first few days of his sickness, when he was not over the effects of his drunk, and was feeling bad, and then he only said he was afraid he was going to die. After that he began to improve, and never to his wife or any member of his family did he express a belief that he was going to die; or tell them anything about how he was shot. Don't you know that, if he had realized that he was go-

ing to die, and that death was certain, he would have said something to his family on the subject? Yet, he never said anything of his family about dying; and he never said anything about how he was shot to anyone except the officers, and that was with a self-serving purpose; when he was making his statement to them in order that he might not be arrested and taken to jail. The officers never told him they were not going to do this; but simply demanded that he tell them how it happened. It wasn't a voluntary statement on his part. There was no one present except the officers, and the statement was made at their solicitation. He was afraid that if he confessed that he had had trouble with Rufus Horton, or had been drunk and supposed somebody was after him, the officers would arrest him; and so I say that this statement was entitled to no credence whatever, and should not have gone to the jury as a dying declaration or otherwise in any view of this case.

Jas. R. McDowell, assistant attorney-general, for appellee.

The question which is presented by the record is whether at the time of the making of this statement, he was conscious of approaching death. The books lay down a very strict rule of law which is elaborated in our state in the *Lipscomb case*, 75 Miss.

According to this rule "this must have been made under the realization and solemn sense of impending death." Counsel seemed to question whether the statements here were so made. It seems to me, however, that though he made no statements that he was conscious of approaching and impending death, yet from his actions and from what the doctor said, he evidently believed that he was going to die, though he might not have known it.

In this connection, I desire to quote from Wigmore (*Wigmore on Evidence*, vol. 2, sections 1439-1440, p.

1805): "As the guarantee consists of the subjective effect of the approach of death, is it essential that declarant should appear to have had a consciousness of the approach of death. . . This consciousness must of course have been at the time of the making of the declaration. It follows, on the other hand, that a subsequent change of this expectation of death, by the recurrence of a hope of life, does not render inadmissible a prior declaration made while the consciousness prevailed."

In the case here, the declarant was never heard to say that he had given up hope of recovery, or words to that effect, but it is evident that such was the gist of his statement. He had the witnesses to leave the room and insisted that his wife should go, for the evident reason, as the record discloses, that their relations were not the best in the world. In fact, she now appears for the defense. He was conscious; his utterances were those of a sane mind; they were concerning the tragedy; they were evidently made at a time when he believed that he was going to die.

Argued orally by *A. T. Stovall*, for appellant, and *J. R. McDowell*, assistant attorney-general, for appellee.

WHITFIELD, C.

The preliminary testimony introduced by the state to show that the deceased had abandoned all hope of recovering is far from being strong enough to meet the requirements of the law in that behalf, as repeatedly announced by this court.

It was therefore error, and fatal error, to admit the alleged dying declaration.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein set out, the case is reversed and remanded.

Reversed and remanded.

Statement of the case.[99 Miss.]

BOARD OF SUPERVISORS OF SMITH COUNTY v. J. J. ASHLEY.

[56 South. 165.]

BOARD OF SUPERVISORS. *Stock law. Code 1906, section 2235.*

Under Code 1906, section 2235, so providing, the board of supervisors of a county is without power to repeal, modify or amend an order made by it creating a stock law district until after five years have expired from the date thereof, and then only upon a like petition or vote as is required for the creation of such district.

APPEAL from the circuit court of Smith county.

HON. C. L. DOBBS, Judge.

Proceeding by J. J. Ashley et al. for a repeal of an existing stock law. From a decision of the circuit court adverse to the board of supervisors, the board appeals.

The facts are as follows:

Proceedings by J. J. Ashley and others for a repeal of the stock law existing in described territory. From a judgment of the circuit court declaring the repeal of the stock law, rendered on appeal from the decision of the board of supervisors disallowing the petition, the board of supervisors appeals. Reversed and remanded.

The record in this case discloses the fact that a two-thirds majority of the freeholders and leaseholders for a period of three years or more, petitioned the board of supervisors to grant a stock law in the entire township, as provided by section 2235 of the Code of 1906. The board acted favorably upon this said petition and declared said township to be a stock law district. Thereafter, but within a period of five years, a like petition was presented to the board praying for a repeal of the stock law then existing in said territory, which petition was disallowed by the board. The petitioners appealed to the circuit court, and that court reversed the board

99 Miss.]

Brief for appellant.

and declared the stock law to be repealed, from which judgment this appeal is taken.

J. J. Stubbs, for appellant.

The case at bar presents a single issue. Is the board of supervisors authorized under the statute to repeal, modify or amend its former declaration, declaring a certain territory a stock law district before the expiration of five years, after such declaration, creating the stock law district, and is the circuit court empowered upon an appeal from an order of the board of supervisors, refusing to modify, amend or repeal its declaration creating a stock law district before the period of five years has expired?

Code 1906, section 2238, reads as follows: "The board of supervisors may, after five years from the date of an order, and from time to time, on like petition or vote, repeal, modify, or amend its order relating to the stock law; but a repeal or amendment shall not take effect so as to require crops to be fenced until after a reasonable time allowed for building fences."

Our construction of this statute is that after the board of supervisors has declared a certain territory a stock law district, and put the freeholders of that territory to the expense and trouble of fencing pastures, and providing for the care of their crops and stock, that the board of supervisors, or the court is without authority to repeal or amend this declaration creating this stock law district for a period of five years, and then after the board of supervisors, upon a like petition as the stock law district was created, may from time to time, repeal, modify, or amend its order declaring a certain territory a stock law district. If this is not what this section of law means, it clearly seems to us that the clause in the section, "after five years from the date of the order," would mean nothing. There can be no intelligent construction placed upon this section to

give any meaning to this part of the section quoted, other than when the freeholders of a district have been taxed with the expense and trouble of preparing for the enforcement of the stock law in a certain territory, that they are protected from having to tear down again and rearrange their fences or pastures before the expiration of a period of five years. What could have been the purpose of the law making body to have drafted a law with this clause, other than to protect the freeholders and citizens of a stock law district from the very thing that has occurred in the case at bar? The case at bar, from a reading of the record, presents that the territory mentioned in the record was legally established as a stock law district, and that some months afterwards, perhaps a year, on appeal from a refusal of the board to repeal its order, declaring this territory a stock law district, the circuit court, by its judgment, repealed the order of the board of supervisors, and thus incurred an untold expense and trouble to the freeholders, when in truth and in fact, the stock law had not been in operation long enough for the freeholders of the territory to know whether they wanted it or not, and we think this error in the court below ought to reverse this cause.

At a glance one can see the wisdom of this saving clause in this section of law to the farmers or citizens who otherwise might have to rearrange their farms for the protection of their crops and stock every eight or ten months. The minority has some rights. No one can read this section and give meaning to this clause without seeing that this is the purpose of the law; that when the stock law is once put in force upon a certain territory, that it becomes a law in operation, for a period of five years, after which time the declaration, creating the stock law district from time to time on petition or vote is subject to repeal, modification or amendment, but not until the period of five years has elapsed from

the date of the order of the board creating the stock law district. A careful consideration of this section of the statute plainly presents this view, and that the court was in error in the case at bar in rendering a judgment repealing the stock law in the territory mentioned in the record of this case. We submit the case should be reversed and the stock law remain in full force under this section for a period of five years before the declaration creating the stock law district is subject to amendment, modification, or repeal.

Wills & Guthrie, for appellee.

The question involved in this case, is, whether or not where an entire township has been, by the board of supervisors, declared a stock law district, on the petition of more than two-thirds of the resident freeholders and leaseholders for a period of three years and more; it can be repealed on a like petition presented to the board within five years from the date of the order so creating the stock law territory.

By reference to the order passed by the board of supervisors declaring the territory involved in this litigation to exist as the stock law territory, and which order is a part of this record, we see that it recites that the petition of A. L. Stringer and others praying for a partial stock law in township one, range eight, Smith county, Mississippi, be granted, and they therein declared a partial stock law in said territory, etc.

Now just how the assistant attorney-general could have inferred from this order that this territory was annexed to a then existing stock law territory is beyond our conception. The record recites the fact that the freeholders and leaseholders for a period of three years and more, to the requisite number as required by law, petitioned the board to grant a stock law in the entire township as section 2235 of the Code of Mississippi 1906 required. And the board acting upon said petition de-

clared the said township a stock law district. Thereafter, but within the period of five years, as the record shows, a like petition was presented to the board praying for a repeal of the stock law then existing in the said territory, and this petition was disallowed by the board from which an appeal was prayed to the circuit court of Smith county and the same was there tried before the court upon the record there presented, and an order entered by the court repealing the said stock law, from which judgment of the court this appeal was taken.

The attorney-general frankly admits in the third paragraph of his brief that upon a similar state of facts, as here presented, the board could repeal its former order. He then presented the question as to whether or not the word "may" as used in section 2238 should be interpreted as "shall," making it as imperative on the board of supervisors to repeal the stock law district as it was upon them to enter the order declaring the district a stock law territory. We contend that it should.

In section 2235 the language of the statute is, "Upon like proceedings any part of a county whether less than a township or not, may be added to any stock law district heretofore or hereafter established." "May" is here used in the same construction and sense that it is used in section 2238 authorizing and empowering the board of supervisors to repeal the order relating to the stock law. This court in *Shaw v. Wofford*, 82 Miss. 143, in passing on that part of section 2235, above quoted, expressly declares "may" to be interpreted as "shall," thereby giving the board of supervisors no discretion whatever in the question of passing orders relative to the establishing of a stock law where the proper showing has been made by the residents of the proposed territory. Could it have been the legislative intent, or could this court so interpret the law as to make it imperative upon the board of supervisors to establish a stock law district when two-thirds or more of the freeholders

and leaseholders for a period of three years and more petitioned for it; and at the same time the legislature in enacting a law for the repealing of the stock law, used the language with reference thereto, made it discretionary with the board of supervisors whether or not they shall comply with the will and desire of the same two-thirds majority of the resident citizens of the territory? No such construction can be placed on the legislative intent, no such meaning given the words therein used.

The precedent set by this court and the interpretation given the word "may" in the case of *Shaw v. Wofford*, above, makes it clear that "may" in section 2238 is to be interpreted as "shall," and the board of supervisors have no discretion in the matter when a petition is presented to them in conformation with law as was in the case under consideration, but are required to repeal the order creating the stock law. This is correct since it gives effect to the will of the majority of the resident citizens of such territory.

There is quite a difference in the positions taken by the counsel for appellant in the two briefs filed herein, the attorney-general very consistently adheres to the position taken by that office in advising the board of supervisors of the different counties of the state, with reference to the repealing of stock law, as is shown by Attorney-General report 1901-1903, p. 25, and Attorney-General Report 1905-1907, p. 82, each, as we think, is a correct construction of the law, giving the board of supervisors the authority to repeal the order creating the stock law, and making it as imperative upon them to enter the order repealing, as it was upon them to enter the order so creating it. In the attorney-general's opinion, report 1901-1903, p. 26, the very learned attorney-general says:

"Where a stock law district has been created in the manner prescribed by law the order declaring it may

be repealed, modified or amended within five years as to the whole district, or as to any part of it, upon the same kind of petition, or vote, that is required by law to create a district originally, but not otherwise. So, where two-thirds of those qualified to do so, petition, or the required majority vote, for the repeal in whole or in part of the order creating the district, it is the bounden duty of the board of supervisors to declare the result and put the will of those expressing it by petition, or vote, into effect. The law is as binding on the board to enter the order creating the district. 'May,' as used in this statute, is in the sense of granting a power rather than in the sense of conferring a discretion, and it means that the board 'shall' respect the wishes of those interested as expressed in the petition, or election, by declaring and recording that wish by bordering the annexation made where the law in that behalf has been complied with otherwise." This we consider the true interpretation of the law.

There was no error in the action of the court below and the judgment should be affirmed, same to take after a reasonable time allowed for building fences, after the receipt of the mandate of this court by the clerk of the court below.

SMITH, J., delivered the opinion of the court.

Under the provisions of section 2238 of the Code, the board of supervisors of a county is without power to repeal, modify, or amend an order made by it creating a stock law district until after the expiration of five years from the date thereof, and then only upon a like petition or vote as is required for the creation of such district.

Reversed and remanded.

J. J. KINNEY v. M. J. & K. C. R. R. Co.

[56 South, 165.]

PLEADING. *Replication. Waiver.*

A defendant waives the failure of the plaintiff to formally deny the matter alleged in his special pleas by not moving for a judgment before the introduction of the evidence begins.

APPEAL from the circuit court of Tippah county.

HON. W. A. ROANE, Judge.

Suit by J. J. Kinney against the Mobile, Jackson & Kansas City Railroad Company. From a judgment for defendant plaintiff appeals.

The facts are as follows:

The appellant, who was plaintiff in the court below, filed a declaration against the defendant railroad company, seeking to recover damages for personal injuries. The defendant filed a plea of general issue, and also special plea setting up contributory negligence on the part of the plaintiff. After the testimony for the plaintiff was in, the defendant asked for a judgment, on the ground that no replications had been filed to the special pleas. Plaintiff then asked leave of the court to file his replications which the court denied, and sustained the motion of the defendant for a judgment.

Spight & Spight, for appellant.

The second assignment of error is to the action of the court in sustaining defendant's motion to exclude the evidence.

We have thus far argued the right to amend which we believe we were clearly entitled to, if it were necessary. We now come to consider whether without an amendment or an offer to amend the trial court was right

in sustaining the motion of defendant to exclude the evidence and give peremptory instruction. We contend that no replication was required to either of the special pleas of the defendant. The plaintiff in his declaration alleges in the first count that the injury received by him was the result of the reckless and careless negligence of the defendant and without any fault on the part of plaintiff. To this count the defendant filed the general issue. It was not necessary for the plaintiff to anticipate the defense of contributory negligence, but he did it and when the general issue was filed the whole case was then made up so far as the pleadings could do so. The general issue denied everything; denied that the plaintiff was hurt; denied that he was hurt on account of negligence on the part of defendant; denied that plaintiff himself was free from negligence. The first and second special pleas of the defendant raised only the question of plaintiff's negligence, which was denied by the general issue. Under this plea of not guilty, all the proofs as to want of negligence on the part of defendant and contributory negligence on the part of plaintiff would have been admissible. When the parties went to the jury and each stated his contentions and evidence was introduced, it was too late to raise any question of the want of a replication. *Slaydon v. McDonald*, 82 Miss. 504, 34 So. 357.

In *Livingston v. Anderson*, 30 Fla. 117, 11 So. 270, the court uses this language: "If no replication at all had been filed to the pleas, we do not see that we could reverse the judgment for want of a formal joinder in issue. The plaintiff alleges in his declaration full performance of conditions in the contract on his part, and the defendant replied that plaintiff has not performed and carried out his contract. These pleas tender an issue to the allegation of performance of conditions on the part of the plaintiff." See, also, *Postal Tel. Cable*

Co. v. Jones, 133 Ala. 217, 32 So. 500; *Montgomery St. Railway Co. v. Hastings*, 138 Ala. 432, 35 So. 412.

In *Johnston v. Birmingham Railway Light & Power Company*, 43 So. 33, the court says: "The plea of not guilty put in issue all the material allegations of the complaint." See the following authorities. *Cunningham v. Lynch*, 22 Wis. 245; *Plymoth v. Fields*, 125 Ind. 323; *Watkins v. So. Pac. R. R. Co.*, 38 Fed. Rep. 711; *McMurtee v. L. N. O. & T. R. R. Co.*, 67 Miss. 601 (7 So. 401).

Flowers, Alexander & Whitfield, for appellee.

Leave was not asked to file the replication until after the plaintiff had closed his case and after motion had been made by the defendant for a judgment. The application came too late. *Duggan v. Champlin*, 75 Miss. 411, 446; *Walker v. Brown*, 45 Miss. 613, 618.

Certainly it was within the discretion of the trial judge to allow or not to allow the application and in the absence of the appearance of any abuse of the discretion the action of the court will not be reviewed here.

The case of *Slaydon v. McDonald*, 82 Miss. 504, has no application here because there the defendant introduced his evidence and never made the point until both sides had closed and the plaintiff had moved the court to exclude the evidence for the defendants. In the case at bar the defendants did not put a single witness on the stand, but made this motion for a judgment at the conclusion of the plaintiff's evidence. And in the case of *Slayden v. McDonald* it appeared that the parties stated the issue to the jury and that the defendant offered his evidence in support of his pleas. The defendant in that case proceeded to the end of the trial just as if the replications had been filed.

Brief for appellant.

[99 Miss.]

SMITH, J., delivered the opinion of the court.

The motion by defendant in the court below for judgment for want of replications to its special pleas was made too late, and should have been overruled. *Slaydon v. McDonald*, 82 Miss. 504, 34 South. 357. The defendant waived the failure of the plaintiff to formally deny the matter alleged in his special pleas by not moving for a judgment before the introduction was commenced.

Reversed and remanded.

MRS. MALINE LEHMAN ET AL. v. E. B. GEORGE.

[56 South. 167.]

ESTATES OF DECEDENTS. *Probation of claims. Amendments.*

Where a claim is not probated against the estate of a decedent as required by law, its registration does not stop the running of the statute of limitations, and after the bar of the statute of limitations has attached the probate cannot be amended.

APPEAL from the chancery court of Forrest county.

HON. T. A. WOOD, Chancellor.

- Proceedings by E. B. George against Mrs. Maline Lehman et al. for the allowance of a claim against a decedent's insolvent estate. From a decree for claimant appeal is taken.

The facts are sufficiently stated in the opinion of the court.

Stevens, Stevens & Cook, for appellant.

We respectfully submit that the court in the former decision referred to above, rendered on the former appeal, disallowed this claim and that this disallowance is

res adjudicata and precludes the appellee from any further rights based thereon.

In the next place the court held that the claim was not probated as is required by section 2106, Code of 1906, and the claim not having been legally presented, registered, probated and allowed within one year after the first publication of notice to creditors to present their claims, as is required by section 2107 of said code, was barred. It is to be noted in this connection that the action taken by the lower court in its decree of March 18, 1911, if sustained, nullifies section 2107, *supra*. The decree directs the clerk to probate and allow the claim when amended in accordance with the motion, and pursuant to this direction an entirely new probation of the claim is had. The claim proven on March 18, 1911, and probated, allowed and registered on said date, is in effect a new claim legally against a decedent more than three years after the first publication of notice to creditors, for notice to creditors was published in December, 1907, by N. T. Currie, Master in Chancery, notifying creditors that claims against the estate would be examined and objections thereto heard by him on Monday, the 20th day of January, 1908. This would clearly nullify section 2107, *supra*.

Furthermore, the action of the lower court was not only erroneous in that it permitted the proof, probation, allowance, and registration of this claim long after the time for such action had expired, but it is further erroneous in that if the proof be distorted into an amendment, which would be violence to all reason, it presents an entirely new and different cause of action or basis of liability from the claim as originally proven on October 9, 1907. We can perceive of no reason why a claimant against the estate of a decedent should be allowed any more latitude in reference to amendments than an ordinary litigant in a law court, and such a litigant would not be permitted even before an appeal to the supreme

court and a reversal to so amend his declaration or basis of action as to completely change the same. We do have in mind reasons why a much more exacting rule should be applied in matters of decedent's estates. The very purpose of the requirement for the claims to be probated within a year is to enable parties interested to know the nature of the claim and inquire into the validity and justness, etc., of the same; and this aim would be entirely defeated if the claimant is permitted to prove one sort of claim within the year and then after waiting until records or memory make it impossible to get at the actual facts, make out an entirely different claim from that originally proven. The court on the former trial held, as we understand it, that the former proof was insufficient to apprise those interested as to the nature of the claim, and therefore failed to meet the requirements of the statute. The claim, as we view it, as it now stands under the probation of March 18, 1911, is in the same attitude as if no probation at all was made before that date, and is therefore barred both by the one year statute of limitation and by the general statute of limitation.

Hathorn & Hearst, for appellee.

The question presented to the court in this appeal is whether it was error for the chancery court to permit the claimant to amend the original probate of his claim by attaching thereto and making a part thereof the itemized statement of the same.

We have carefully read the brief prepared by counsel for appellant and we think a fair statement of their contention is that the amendment of this claim, as asked for by the appellee and allowed by the chancery court, was, in effect, the presentation of an original claim, or at any rate was a different claim from the original claim. and, in as much as the time for the probation of claims had expired, the amendment was too late and the court

was without authority to permit the same. In this contention, we think counsel for appellant are in great error. The amendment did in no wise present a new or different claim from the original one, nor did it in any sense change or alter the nature of the original claim; the whole effect of the amendment was to perfect the insufficient probate of the original claim. The truthfulness of this statement is shown by reference to the original and to the amendment, and we submit that it is so clearly shown by the original probate and the amendment that appellee did not undertake to probate a new or different claim nor change the nature of the old claim that we will not burden the court with any argument on this point.

Now, this is not a case where there was a total lack of any probate, in which case we admit that claimant would not be permitted to make such an amendment; but in this case the probate was in almost every particular valid, and was, we submit, slightly defective, and all that it needed to make it valid was (as Judge Mayes in his dissenting opinion in the former appeal, and the statement is nowhere controverted, well said, in effect) to add to the original probate an itemized statement of the claim, and this is precisely what the claimant did by his amendment. It is purely and simply an amendment to an imperfect probate of a meritorious and just claim.

Section 175 of the Code of 1906 authorizes the courts of law to allow all amendments to pleadings and proceedings at any time before verdict so as to bring the merits of the controversy between the parties fairly to trial. Such amendments are permitted any time before verdict even in a circuit court, and the rule in a court of equity has always been and should be to allow more liberal amendments than the law courts do where rigid rules of pleading are required to be observed, and under the statute mentioned and the just and equit-

able rules of the court, the custom and practice is now universal that the courts will permit any amendments where to do so the ends of justice will be subserved, and we submit that if there ever was an occasion where justice and equity would be promoted by permitting an amendment, this is one of those occasions, because to permit the amendment the claimant will be allowed to receive his pro rata of the dividends of the estate against which he has a claim that is nowhere denied to be just and meritorious and honest, but on the contrary is positively shown to be a just claim against the estate. If in fact the amendment is not allowed, this meritorious claim will be disallowed on the merest kind of technicality.

Where a declaration is insufficient at law, or a bill in equity or any other pleading as for that matter, and a demurrer is filed and the question finally reaches the supreme court, the courts will then, on reversal, permit the parties to amend the declaration or bill or other pleading even where the declaration or bill fails to state the cause of action sufficiently and even after the statute of limitations may have run against the cause of action presented by bill or declaration; this rule has been uniformly adhered to and is so generally practiced that we suppose it is almost a matter of right now for parties to make such amendments. We take it that there is absolutely no difference in principal presented on this appeal from that allowing amendments in the cases illustrated above; in other words the objection to the probate of the claim because of its insufficiency in law was in legal effect the same as a demurrer to a bill in equity because of its insufficiency, and we challenge counsel for appellants to show any difference in legal effect of the principal in the two cases and to show any reason why any different rule should govern in one case from that governing in the other; could it be contended that if the case at bar had been in the attitude of claimant

filing a bill in chancery and the appellant having demurred thereto, and the supreme court had sustained the demurrer, the complainant would not have had the right to amend his bill? We think not. And yet that is, in effect, the contention made by appellant in this case.

We think the court in permitting this amendment was following the authority given by the statute cited above, and was also exercising that broad discretion which is always given to the court in allowing amendments, and in allowing the same the court was only promoting the ends of justice which the nature of the case demanded.

The best authority that we have been able to find, and the only one which we think is directly in point, is the case of *Hutchinson, Trustee, v. Otis, Wilcoz Co.*, decided by the Supreme Court of the United States June 1, 1903, and reported in 10 Amer. Bankruptcy Report, 6. 135 *et seq.* By analogy this case is identical with the case at bar, in that it is a case where an amendment was sought to be made to the proof of a claim in bankruptcy and the court allowed the amendment, this amendment having been filed after the expiration of the time allowed by the federal statute for the probation of claims in bankruptcy, the court said, in that opinion, among other things:

"It is argued that the allowance of the amendment is within section 57-n forbidding proofs subsequent to one year after the adjudication, etc. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proven. The clause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitations has run, when the original declaration was bad."

We submit, therefore, that the action of the court in allowing this amendment was proper, and that this case should be affirmed.

SMITH, J., delivered the opinion of the court.

This cause was considered by us once before under the style of *Lehman v. Powe*, 95 Miss. 446, 49 South. 622, wherein we held that appellee's claim had not been probated in the manner required by law. Its registration, therefore, did not stop the running of the statute of limitations, and consequently, before the application to amend was made, the claim had become barred. *Cheairs v. Cheairs*, 81 Miss. 662, 33 South. 414. The decree of the chancellor recited that: "The said E. B. George is permitted to amend the probate of his said claim in the manner and form and in the matters and things sought and set out in his said motion, and to file the said amendment with the clerk, and the clerk is directed to probate and allow the said claim when so amended." We are not called upon to decide whether or not the chancellor has the power to enter a decree of this character where the statute of limitations is not involved; for he is, of course, without such power when the claim, the probate of which is sought to be amended, has become barred by the statute of limitations. To hold otherwise would result in the nullification of the statute.

The decree of the court below is reversed, and decree here dismissing appellee's petition for leave to amend.

Reversed.

C. W. POYTHRESS v. STATE.

[56 South. 168.]

1. PUBLIC RECORDS. *Forgery. Cancellation of deed of trust. Indictment. Code 1906, § 1177.*

To justify a conviction of falsifying a record under Code 1906, § 1177, by entering a false satisfaction on the margin of the record of a trust deed, it must be charged in the indictment that the cancellation of the deed of trust by marginal entry on the record was attested by the chancery clerk and that this was done must be proven on the trial.

2. SAME.

The attestation of the clerk was necessary to give the cancellation legal efficacy or validity.

APPEAL from the circuit court of Lauderdale county.
HON. JOHN L. BUCKLEY, Judge.

C. W. Poythress was convicted of making a false entry on the public records and appeals.

The facts are as follows:

The appellant was indicted under section 1177 of the Code of 1906 for making a false and fraudulent entry on the public records of Lauderdale county. Said section is as follows: "Every person who, with intent to defraud, shall falsely alter, destroy, corrupt, or falsify the record of any will, conveyance or other instrument the record of which shall by law be evidence, or any record of any judgment or decree of a court of record, or the enrollment of any such judgment or decree, or the return of an officer, court, or tribunal, to any process of any court, or who shall falsely make, forge, or alter any entry in any book of record, or any instrument purporting to be any such record or return, with intent to defraud, shall, upon conviction, be guilty of forgery."

After setting out other facts, the indictment charged that the defendant "by corrupt and false entry on the margin of the said record of the said deed of trust as aforesaid the following false and fraudulent entry, to-wit: 'Satisfied in full and cancelled, September 20th, 1910. (Signed.) C. W. Poythress'—with the unlawful and felonious intent" etc. As a matter of fact, the record showed that this marginal entry was duly attested by the chancery clerk in accordance with section 2781 of the Code, though the indictment fails to set out this attestation.

There was a demurrer to the indictment, which set out, among other grounds, the following: "(8) Because the alleged marginal entry was under the law a nullity and did not affect the rights or interests of any person whatever. (9) Because the law prescribed how a deed of trust shall be cancelled of record, and the marginal entry alleged to have been made was not a compliance with the law, and did not affect the force or validity of the deed of trust as a recorded instrument, or as evidence of title. (10) Because the cancellation of a deed or trust by marginal entry must be the joint act of the beneficiary (or trustee) and the chancery clerk, and it is not alleged that the marginal entry complained of was so made, or that it was in any other way or manner a valid and binding act of cancellation."

The demurrer was overruled, and the case proceeded to trial; the court admitting proof of the attestation. From a conviction, this appeal was prosecuted.

Amis & Dunn, for appellant.

The indictment is manifestly defective. The statute, under which it was drawn, defines the crime attempted to be charged as forgery. The making of the entry in the record book, as set out in the indictment, did not constitute forgery, for the very simple reason that the entry, alleged to have been made, had no legal efficacy

as a record entry, and therefore could not in the very nature of things have purported to have discharged, diminished, increased, created or in any manner affected any demand or obligation, claim, right or interest in favor of or against any person. The effort was to charge the commission of a crime under the statute, by the making of a false entry of the cancellation of a deed of trust, which appeared of record in a public deed record book, in the office of the chancery clerk. The indictment sets out the exact words employed in the alleged cancellation, and the words used, or the thing done, as charged did not constitute a cancellation of record at all. Section 2781 of the Code of 1906 prescribes the mode and furnishes the only lawful authority for the making of a cancellation of a deed of trust by an entry on the margin of the record, and the section explicitly requires such entry to be attested by the chancery clerk, the custodian of the record. There can be no such thing as a marginal cancellation of a deed of trust of record, unless the same be attested by the clerk. Such cancellation, to be efficacious, must be made by the concurrent acts of the mortgage, the trustee, or some person contractually authorized to perform the act and the chancery clerk of the county. It seems to us that it would be a waste of time to discuss the proposition as to whether or not a cancellation of record, or putting it in another way, a record cancellation, not made as the law requires it to be made, would destroy the effect of the recorded instrument. That the proposition must be answered in the negative, is too plain for argument. If then, the cancellation as made, as set forth in the indictment, did not meet the requirements of the statute, in legal contemplation, there was no cancellation of record and forgery cannot be predicated of it.

The principle of the proposition here contended for, was aptly expressed by Stone, C. J., in the case of *Dickson v. State*, 81 Ala. 6, wherein it is said:

"To authorize an indictment for forgery, the instrument must either appear on its face to be, or be in fact, one which, if true, would possess some legal validity; or, in other words, must be legally capable of effecting a fraud."

This principle, as announced in *Dickson v. State*, was expressly approved by our court, in the case of *France v. State*, in 83 Miss. 281.

Wyatt Easterling, for appellant.

Now consider that alleged entry in the light of section 2781, Code 1906, which is, leaving out the parts which are not pertinent to the issue, as follows, to-wit: "Satisfaction to be entered on the record. Any mortgage or *cestui que trust*, or the assignee of any mortgage or *cestui que trust*, of real or personal estate, having received full payment of the money due by the mortgage or deed of trust, shall enter satisfaction upon the margin of the record of the mortgage or deed of trust, which entry shall be attested by the clerk of the chancery court and discharge and release the same, and shall bar all actions or suits brought thereon, and the title shall thereby revert in the grantor," etc.

It is glaringly apparent from the reading of that section that the cancellation as it appears in the descriptive part in the indictment was a nullity and did not affect the rights or interests of any person whatever, and that it did not affect the force or validity of the deed of trust as a recorded instrument or as evidence of title, because section 2781 prescribes that the cancellation of a deed of trust by marginal entry must be the joint act of the beneficiary (or trustee), and the chancery clerk, and it is not alleged that the marginal entry was so made, or that it was in any other way or manner a valid and binding act of cancellation. And, too, if we look to the indictment, we are not told whether or not there had ever been a transfer or assignment of the debt, such

as would perforce of section 2794 of Code of 1906 have to be noted of record, by appellant or any one. If the indictment does not allege a transfer or assignment legally sufficient, then appellant was the person to cancel the deed of trust; and, on the other hand, if the transfer or assignment was a matter of record, then the alleged cancellation was a nullity and did not and could not injure or defraud any one.

It may be argued by counsel for appellee that it was not necessary to allege the attestation. That sort of a proposition will not stand the test, as we know, and we learned it during, and from, our first months study of criminal law, that in order for a person to be guilty of forgery, his acts, if valid, must be binding. Now I submit in candor that the words alleged in the indictment to have been placed upon the margin of that record by appellant in no wise constituted a legal cancellation, or such a cancellation which would have bound or affected Mrs. Martin; that they neither altered, destroyed, corrupted or falsified the record, as there was no attestation, and, so far as the writings or words employed are concerned, any words without any connection with the record might have been written upon the margin thereof with equal force or effect. One would have been as binding as the other, but why argue an act which had no material effect when our court has declared that if such a fact is necessary to be known and considered along with the writing, it must be alleged. "When extrinsic facts are necessary to be known and considered along with the writing in order to constitute forgery, an indictment therefor must set out such facts as well as the instrument itself." *France v. State*, 83 Miss. 281.

James R. McDowell, assistant attorney-general, for appellee.

The only other straw at which appellant grasps is a legal technicality. He says that, the demurrer to the

indictment should have been sustained because it charges that the false entry made by the appellant upon the record is as follows: "Satisfied in full and canceled September 20, 1910. C. W. Poythress." The proof shows that in addition to this entry made by appellant, the clerk attested the cancellation as required by law. Counsel contends in the first place that the indictment was bad, because it did not set out the clerk's attestation as part of the false entry made by the appellant; and further that there is a variance in the indictment and the proof, because the proof shows this attestation of the clerk. In reply to this, I will say that the false entry made by the appellant did appear in the indictment, in full. That is what he did. That if the writing which he falsely placed of record. In order to give it legal effect, it was necessary that the clerk should attest it. Where an indictment purports to set out the words forged by the defendant they should set them out in full. This is done here. It could not truthfully be said in an indictment that the defendant forged the attestation. He did not. This was done in good faith by the clerk. The forged writing is what is done by the defendant. That which is done by the clerk, need not be set out in words and figures. It is a matter of proof which must be made to support the indictment and show the act of the defendant as a matter of fact had a legal and binding effect and actually destroyed the collateral held by Miss Myers and had the effect of defrauding her. Your honors will bear in mind that the object of an indictment is to place the defendant on notice of the offense he is called upon to meet and enable him to prepare for a defense; and it must be so drawn that it will legally charge an offense in terms sufficient to prevent a subsequent trial for the same offense should a plea *autre fois* convict or acquit be interposed. I presume counsel will not contend that this indictment falls short in that respect. As I understand his contention, he simply stands pat and says that

the attestation of the clerk is an extrinsic fact which cannot be proven on the trial, unless charged in the indictment, and that the indictment is bad unless the clerk's attestation is set out as part of the forgery committed by the defendant. The offense under our statute of falsifying a record is an outgrowth of the old common law offense of cheat. So that, if the words used in the false entry are attempted to be quoted and are not quoted correctly, still the indictment would be good under common law. The omission of the attestation if necessary under the statute, would not be fatal to the indictment. Bishop's Statutory Crimes (3d Ed.), sec. 164, p. 181.

But I contend that under the statute, the attestation need not be set out. The falsifying of the record by the defendant must be set out. It must be shown what he did. The clerk's attestation is simply a matter of proof to show that what he did had a legal effect of defrauding some one.

WHITFIELD. C.

The eighth, ninth, and tenth grounds of demurrer to the indictment in this case were well taken. It was essential that the indictment should have averred that the cancellation of the deed of trust by marginal entry on the record was attested by the chancery clerk as required by law, and it was essential that this should have been proven. The attestation of the clerk was necessary to give cancellation legal efficacy or validity. *France v. State*, 83 Miss. 281, 35 South. 313; *Robinson v. State*, 35 Tex. Cr. R. 54, 43 S. W. 526, 60 Am. St. Rep. 20; *Sutton v. State*, 58 Neb. 567, 79 N. W. 154; *Overly v. State*, 34 Tex. Cr. R. 500, 31 S. W. 377.

We notice no other assignment of error. *Reversed*.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment of the court overruling the demurrer

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to the indictment is reversed, the demurrer sustained, the indictment quashed, and the prisoner will be held to answer such further indictment as the grand jury may present against him.

MASONIC BENEFIT ASSOCIATION v. ANN HOSKINS.

[56 South. 169.]

1. MUTUAL BENEFIT INSURANCE. *Certificate. By-laws. Presumption.*

Where a certificate issued to a member in a mutual benefit association provides that "any failure to comply strictly with the laws and regulations of the order as prescribed by its grand lodge, causes forfeiture of the membership represented by this certificate." This provision in the contract does not at all expressly provide that the member should be bound by all by-laws and regulations then in force or thereafter to be enacted.

2. BY-LAWS. *Presumption.*

There is no presumption that by laws shown to have been enacted after the certificate of membership was issued were in force when such certificate was issued and in the absence of any provision in the certificate that the member should be bound by subsequent enacted laws, he is not affected by such laws.

APPEAL from the chancery court of Yallabush county.
HON. I. T. BLOUNT, Chancellor.

Suit by Ann Hoskins against the Masonic Benefit Association. Decree for plaintiff and defendant appeals.
The facts are as follows:

One Morris Hoskins, the husband of appellee, procured a benefit certificate in the appellant association in the year 1895, which entitled his widow, or his legal representatives, in the event of his death, to the sum of money here sued for. The holder of each certificate was required to pay one dollar per month to the en-

dowment fund. In the year 1904 certain by-laws of the association were compiled and promulgated, one of the provisions being that any failure to keep all dues paid worked a forfeiture of membership. Morris Hoskins kept all of his dues paid up to March, 1907. He failed to pay dues for March, April, May, June, July, and August, 1907. He got sick a few days prior to August 13, 1907, and on that day applied to the secretary of the local lodge for what is known as a "renewal certificate" and paid two dollars for same. The renewal certificate was issued on August 19th. Under the by-laws of the association, it did not become valid until after thirty days. Hoskins died August 21st. After his death, appellee filed a bill for discovery and for a recovery of the amount due under the certificate. The defense was that Hoskins had forfeited his membership in the association by failing to pay dues, and that the by-laws of the association were binding upon him and all other members, whether they joined the association before or after their promulgation.

George B. Power and Cassedy & Butler, for appellant.

The only remaining question is whether or not decedent's death within thirty days after his renewal made void the renewal certificate.

The renewal certificate provides on its face, "Not valid until after thirty days." And it is an admitted fact in this case that the renewal was applied for on August 13th, issued on August 19th and decedent dies on August 21st. Section 20 of the Constitution provides for renewals upon the payment of the fee of two dollars, and further provides that "such renewal will not be valid until after thirty days, but must pay the first assessment due after date of said renewal," meaning thereby that the member must pay the next assessment. Section 27 provides, "No. 'renewal membership' shall be

valid until thirty days shall have elapsed after the renewal fee of two dollars shall have been received by the treasurer of the M. B. A. However, the thirty days shall be reckoned, etc." Thus it appears that in express and unmistakable language it is provided that the renewal certificate shall not be valid until after thirty days. The reason for this is obvious. No member should be permitted to reinstate himself after a long delinquency when in his last illness; and it may be well to note in this connection that the laws require a member to apply for his renewal in open lodge and provides that his application therefor must be accompanied by a health certificate. These formalities were not complied with in the instant case but the order seeks to take no advantage of that fact; and in this same connection we call the court's attention to the further fact that the claim was barred by the provisions of sections 5 of the constitution considered in connection with section 2575 of the Code of 1906, but the order seeks to take no advantage of the statute of limitations. In other words, it submitted its cause on the merits; and yet the chancellor finds that the proof does not show that the deceased was non-financial. On the contrary, we say that the proof is conclusive that he was non-financial and the only scintilla of evidence tending to show otherwise is that about a year and three months after the date of death, proof of death was made in it, it is stated that decedent was in good standing at the time of his death.

Counsel for appellee have filed a forty-seven page brief in an effort to uphold the chancellor's finding and this within itself is *prima facie* evidence of error. Many cases are cited in support of his contention. We have no quarrel with the authorities. The trouble is, in our view, they have no application to the case now before the court. The question now under discussion, in our humble judgment, is absolutely settled by the case of *Order of Jacobs v. Moncrief*, 50 So. 558. It is quite

true that the Moncreif case was presented on demurrer, but it is elemental that the allegations must conform to the proof. In other words, the fact controls whether alleged and admitted or proven and denied.

If under any possible view the court should be of the opinion that the constitution and by-laws are not a part of the record in this case, or that the case is not to be considered here as if they were a part of the record, then we respectfully submit that the chancellor was in error in refusing to remand the case to permit further proof as to their validity, etc. It will be noted that counsel for appellant generously agreed that the case might be heard before the expiration of the four months and had no opportunity to ascertain that the court would sustain the motion to suppress the deposition until it was acted upon and the case decided, and immediately thereupon then requested the court to remand the case for the purpose of taking further proof on this point. Courts sit to administer justice, to arrive at the truth, to do equity, and while they have discretion in such matters it cannot be arbitrarily exercised and the rights of litigants set at naught. A striking case is that of *Russell v. Denson*, not yet reported, decided March 13, 1911, where this court reversed a case because the trial court refused complainant leave to amend his bill after such leave had been tendered and declined and refused him leave to take a non-suit after the bill had been dismissed. And in this connection we deem it not a miss to call the court's attention to the fact that in the recent case of *Mitchell v. State*, 95 Miss. —, this court did look to the opinion of the trial court in ascertaining the grounds upon which its judgment was predicated, but as hereinbefore stated under our view is wholly immaterial for the purposes of this case whether the court considers the chancellor's opinion as a part of the record or not.

We respectfully submit that under no view of the case and under no view of the law can the chancellor's finding be sustained. The facts are admitted, or conclusively established; the issue is a narrow one, there are no complications. If the order had the power to enact the constitution and laws in question these provisions mean what they appear to mean on their face this case must be reversed. Counsel concede that the order had the power to provide that failure to pay worked a forfeiture; that the order had the power to provide that no reinstatement should be valid until after thirty days and seek to uphold the finding of the chancellor in an effort to make the English mean something which in its ordinary acceptation it does not mean.

Creekmore & Stone and L. J. Winston, for appellant.

The main question in this case is whether or not Morris Hoskins stood suspended on account of the non-payment of monthly dues. It is not contended that there was any affirmative action taken by the lodge after the failure to pay the monthly dues, and formally suspending the member. This question was one of considerable importance at the trial of this cause, which took place the first week in November, 1909, the final decree being rendered in vacation in January, 1910. We contended at the trial that this was the only point of importance in the case, and that a decision of this point necessarily involved the entire disposition of the case, and we think yet that this is true. To sustain our position, that the insured became suspended *ipso facto* on the failure to pay the monthly dues, we presented authorities from all over the country, holding that the provisions of fraternal insurance societies, similar to sections 5 and 12 of the constitution of defendant company, had been held to be self-operative in every court, requiring the formal act of suspension on the part of the defendant lodge, or its subordinate lodge. 28 Cent. Dig., "Insurance," secs.

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Brief for appellant.

891, 900, 905, 87 Am. St. Rep. 860, 5 L. R. A. 805, 6 L. R. A. 95.

We also refer to the decision of our own court in the case of *Murphy v. Independent Order of Sons and Daughters of Jacob of America*, 27 So. 624, and especially to the second paragraph of the opinion by Chief Justice Whitfield where our court upheld the right to make such self-operative provisions in an insurance contract; also, to the decision of our court in *Morgan v. Independent Order*, 90 Miss. 864, 44 So. 791, where our supreme court, while declaring that a decision as to the operation of certain provisions was not necessary to a decision of that particular case, seems to us to very strongly favor our view of the operation of such provisions. But since the trial of the case at bar, this question has been settled by decision of the case of the *Order of Jacob v. Moncrief*, 50 So. 558. This case is directly in point, and consideration, and citation of the foreign cases, is unnecessary except to show that in taking this stand as to the operation of provisions in an insurance contract, our court speaking through Justice Mayes, was in line with both federal and state courts all over the country. Of course, where there is a direct provision of the constitution of an insurance order that notice of suspension for non-payment of dues will be served on a delinquent, or that formal action shall be had by either the Grand Lodge or the subordinate lodge on account of the non-payment of the dues formally suspending the delinquent, it would be unjust to hold the member suspended unless these preliminary requirements had been fulfilled; the same would be true where there were facts, as in the *Morgan case* in 44th So., that would necessarily have taken this case out of the general rule. There is nothing in the *Morgan case* or the *Murphy case* inconsistent with the later case of *Moncrief*, or with the contention of appellant in the case at bar. The provisions of the constitution of the appellant are plain and unequivocal, and the

Brief for appellee.

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provisions for reinstatement of a member, suspended for non-payment of dues, are the most generous that we have ever known. It will be remembered that the deceased in this case undertook to take advantage of this provision as to renewal, and it was only when he died, and failed to get the benefit of the renewal certificate, that his wife found fault with the order for having previously suspended the deceased for non-payment of his dues.

Walter P. Armstrong, for appellee, filed an elaborate brief contending that the by-laws of the defendant were not properly proven and hence were ineffective to avoid Hoskins' policy.

Even if the by-laws were properly proven, they would not have avoided this policy because:

First. They were not registered in the office of the insurance commissioner.

Second. They were passed after the issuance of Morris Hoskins' policy.

Third. They were not self-executing and no action was taken to suspend Hoskins.

Defendant is estopped from setting up any forfeiture of Hoskins' policy and cites the following authorities: 29 Cyc., 232; *Schenfler v. A. O. U. W.*, 47 N. W. 799 (Minn.); *Royal Circle v. Achterrath*, 204 Ill. 549, 63 L. R. A. 252; *Pethericks v. Order* (Mich.), 72 N. W. 262; *Monahan v. Supreme Lodge, etc.*, 92 N. W. 972 (Minn.); *Royal Circle v. Achterrath*, 204 Ill. 549, 63 L. R. A. 458; *Monahan v. Supreme Lodge, etc.*, 92 N. W. 972 (Minn.); Opinion of Chancellor, Tr., pp. 42 and 43; *Herman v. Supreme Lodge Knights of Pythias*, 66 N. J. Law 77, 48 Atl. 1000; *Page v. Knights & Ladies of Am.*, 61 S. W. 1068 (Tenn.); *Herman v. K. of P.*, N. J. Law 77, 48 Atl. 1000; *Page v. Knights & Ladies of America*, 61 S. W. 1068 (Tenn.); *Supreme Lodge v. La Malta*, 95 Tenn. 166, 31 S. W. 493; Tr. p., 38 and 39; *Futch v. Jeffries*, 59 Miss. 512; 13 Cyc., 934; *Phoenix Ins. Co. v. Fuller*, 53 Neb. 811, 4 L. R. A. 408; *Kreis v. Railway*, 33 S. W. 65:

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Brief for appellee.

Penn v. Western, 15 L. R. A. 798 (Ill.); 2 Cyc., p. 1061; 16 Cyc., p. 380, title, Equity; 16 Cyc., p. 328, title Equity; Fletcher on Equity Pleading and Practice, 697; *Bower v. Bettis*, 48 S. W. 292 (Tenn.); *Thorington v. Montgomery*, 10 So. (Ala.) 634; *Beard v. Green*, 51 Miss. 856; *Morgan v. Independent Order*, 90 Miss. 864; *Moseley v. Order*, 77 Miss. 830; 3 Cooley's Briefs on Insurance, 2383; 1 Cooley's Briefs on Ins. 709; *Miller v. Tuttle*, 73 Pac. 88 (Kas.); *Morrison v. Odd Fellows*, 18 N. W. 13 (Wis.); 29 Cyc. 77; *Starling v. Order*, 66 N. W. 340 (Mich.); *Hobles v. Benefit Assn.*, 82 Iowa 107, 47 N. W. 683, 11 L. R. A. 269; 29 Cyc., 77; *Starling v. Order*, 66 N. W. 340; *Hobbs v. Benefit Assn.*, 82 Iowa 107, 47 N. W. 983; *Covenant Mutual Life Assn. v. Tuttle*, 87 Ill. App. 309, 310; *Grand Lodge A. O. U. W. of Mo. v. Sater*, 44 Mo. App. 445; *Carnes v. Traveling Assn.*, 68 Am. St. Rep. 306, 106 Iowa 281, 76 N. W. 683; *Benefit Assn. v. Warren*, 24 Ill. App. 357; *Ins. v. Comer.*, 17 Pa. St. 136; *Warment v. Supreme Conclave*, 107 Ga. 115, 32 S. E. 951, 3 Am. & Eng. Ency. of Law, 1087; *Schnefler v. A. O. U. W.*, 45 Minn. 256, 47 N. W. 799; *Harris v. Wilson*, 86 Mo. App. 406; *Jelly v. Mutual Aid Society*, 95 N. W. 199, 120 Iowa 689, 98 Am. St. Rep. 378; *Brooks v. Conservative Assn.*, 106 N. W. 913, 132 Iowa 377, 119 Am. St. Rep. 560; 3 Cooley's Briefs on Ins., 2391; *McDonald v. Chosen Friends*, 78 Cal. 49, 20 Pac. 41; *Supreme Lodge v. Wisher*, 72 Tex. 257; *Roger v. Society*, 55 L. R. A. 605, 3 Am. & Eng. Ency. Law, p. 1087; 29 Cyc., 182, and cases there cited; *Osterman v. Lodge* (Cal.), 43 Pac. 412; 29 Cyc., 1714, and notes; *Morgan v. Order*, 90 Miss. 847; *Murphy v. Independent Order*, 27 So. 624, 77 Miss. 111; *Order of Jacob v. Moncrief*, 50 So. 558; *Langenecker v. Trustees*, 87 Am. St. Rep. 860 (Wis.); *Robinson v. Central Ins. Co.*, 6 L. R. A. 96; *Fower v. Life Ins. Co.*, 5 L. R. A. 805; *Lord v. Society*, 88 N. W. 872; *Morgan v. Independent Order, etc.*, 90 Miss. 864; *Mutual Reserve v. Hamlin*, 139 U. S. 297, 11 Sup. Ct. 614;

Waterworth v. Am. Order of Druids, 164 Mass. 574, 42 N. E. 106; *Supreme Counsel v. Orcuth*, 119 Fed. 682, 56 C. C. A. 249; *Columbus Life v. Harrihan*, 98 Ill. App. 22; 3 Cooley's Briefs on Ins., 2391.

WHITFIELD, C.

We think the testimony offered to prove the by-laws and the constitution of this order by the witness Kelley was rightly held incompetent by the court below. *Herman v. Supreme Lodge K. of P.*, 66 N. J. Law 77, 48 Ati. 1000; *Page v. Knights & Ladies* (Tenn.), 61 S. W. 1068. But, under the peculiar circumstances of this case, we think, if that were controlling, that the chancellor should have remanded the case and permitted competent proof to be taken.

But we think the chancellor was further correct in holding that, if the constitution and by-laws had been properly proven, the plaintiff was still entitled to recover on the case made by the record. The provision of the certificate on which the defendant relied as showing that Morris Hoskins, the insured, was bound by these by-laws, is in these words: "Any failure to comply strictly with the laws and regulations of the M. B. A. as prescribed by the aforesaid Grand Lodge causes forfeiture of the membership represented by this certificate." It is perfectly obvious that this provision in the contract does not at all expressly provide that Morris Hoskins should be bound by all by-laws and regulations then in force or thereafter to be enacted. The rule of construction in cases of this kind is set out in *Morgan v. Independent Order*, 90 Miss. 864, 44 South. 791, where the court says: "The court cannot overlook the fact that associations of the character now before the court largely deal with the illiterate and ignorant. The by-laws consist of a multiplicity of rules and regulations in a volume composing a small book. A correct interpretation of

their meaning often puzzles the astute. Is it, then, a matter of wonder that courts construe their contracts most favorable to the insured? This court has said in *Murphy v. Independent Order, etc.*, 77 Miss. 830, 27 South. 624, 50 L. R. A. 111, that in dealing with these orders there shall be a liberal construction of by-laws in favor of the insured, so as to prevent a forfeiture, if possible. This is but the announcement of the universal rule upon the subject by all the courts."

Keeping in mind this rule of construction, it is further to be said that the overwhelming weight of authority is to the effect that in those provisions which purport to bind the insured, if there is no express provision that he shall be bound by laws to be enacted in the future, then such laws so enacted in the future do not bind the insured. 1 Cooley's Briefs on Insurance, 709; *Miller v. Tuttle* (Kan.), 73 Pac. 88; *Morrison v. Odd Fellows*, 59 Wis. 162, 18 N. W. 13; 29 Cyc. 77; *Startling v. Order*, 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709; *Hobbs v. Benefit Assn.*, 82 Iowa 107, 47 N. W. 983, 11 L. R. A. 299, 31 Am. St. Rep. 466; and many other authorities. The cases of *Miller v. Tuttle* and *Startling v. Order*, *supra*, are very clear on this point.

The pamphlet purporting to contain the constitution and by-laws of this order, expressly states that they were compiled by a special committee in November, 1904. The benefit certificate was issued to Morris Hoskins in 1895. It thus clearly appears from the only evidence introduced on the subject, and that by the defendant, that those by-laws were passed nine years after the contract between Morris Hoskins and the defendant was entered into. The learned counsel for defendant say that, "where a certain constitution and by-laws are approved, they are presumed on the state of this record to have been properly adopted. It certainly could not be held on the state of this record to be necessary for the appellant to go back to the date of the issuance of any particular

policies and prove what changes had taken place in the constitution and by-laws since the issuance of same." But the first great trouble which counsel for defendant encounter is that the by-laws, when proved, are shown to have been enacted nine years after the certificate was issued, and it is wholly fallacious to say that any presumption could be indulged that by-laws which appeared from the defendant's own testimony to have been enacted nine years after the certificate was issued, were in force when the certificate was issued. It is perfectly correct to say that a state of affairs shown to have existed in the past may be presumed to continue to exist, in the absence of proof to the contrary. But surely there never can be any legal presumption that a condition of affairs shown to exist now, in the present, for the first time, existed in the past.

As very correctly said by learned counsel for appellee: "If the defendant's contention on this point were correct, then defendant could show that a set of by-laws were passed on the day before the member's death, and it would be presumed that they existed when the certificate was given twelve years before. That would be absurd." Since, therefore, the only evidence, after the constitution and by-laws are considered, as to when they were adopted, shows that they were adopted nine years after the certificate was issued, and since there is in the provision relied on in the certificate no express contract by Morris Hoskins to be bound by all laws thereafter enacted, the appellant was without any valid defense.

Affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein set out the decree of the court below is affirmed.

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Statement of the case.

A. D. ANDERSON v. H. McINNIS ET AL.

[56 South. 170.]

CHANCELLORS. *Decree. Amendment. Vacation. Code 1906, §§ 506, 507 and 1016.*

Under Code 1906, § 506, so providing, "A chancellor may deliver opinions and sign decrees in vacation, in cases taken under advisement in term time, and by consent of the parties may try cases and sign decrees therein in vacation, which decrees shall be recorded on the minute book and have the same effect as if made and recorded in term time, being appealable as in other cases." *Held*, that under the terms of this statute, all decrees authorized by it to be entered are final decrees and are to be given the same effect as if rendered during a term of court and after the adjournment of the court are beyond the power of the chancellor to recall or modify, except for fraud or in accordance with section 1916, permitting the amendment of a decree where it may be safely done from the record to correct a mistake, miscalculation or misrecital of any sum, quantity or name.

APPEAL from the chancery court of Jones county.

HON. SAMUEL WHITMAN, JR., Chancellor.

Suit by H. McInnis et al. against A. D. Anderson. From a decree amending a final decree rendered in vacation, defendant appeals.

The facts are as follows:

The case was heard by agreement in vacation, and the chancellor outlined his opinion to counsel, who prepared a decree and sent it to the chancellor for signature. It was duly signed by the chancellor and placed of record by the clerk in the minutes of the court. At the next term of the court, the appellees here, who were complainants in the court below, filed the following motion: "Now come the complainants in the above-styled cause and move the court to modify the decree entered in vacation in the above-styled cause, and for grounds for said motion say that the decree as entered on the vacation min-

utes does not represent the true decree of the court, in that, in the decree as entered on the minutes, defendant, A. D. Anderson, is given credit for one hundred dollars for four houses, which he claims that plaintiff sold to him, but which he did not get, when as a matter of fact the chancellor did not intend to give Anderson, the defendant herein, credit for the said one hundred dollars, and that the amount given by said decree to complainants should be increased by the sum of one hundred dollars." The chancellor modified the vacation decree in compliance with the prayer of said motion, and from this decree an appeal is taken.

Hardy and Arnold, for appellant.

This decree having been signed and entered on the minutes of the court, the situation was the same as though it had been entered in term time and the court adjourned and the court had attempted at a subsequent term to enter an order amending the decree rendered in the cause. When the court has adjourned its power of judgments and decrees cease. *Railway Co. v. Bolding*, 69 Miss. 255; *Arthur v. Adams*, 49 Miss. 404; *Wiggle v. Owen*, 45 Miss. 691.

This decree had the same effect and force as if made in term time and the court had no power or authority to disturb it.

As decisive of this matter we submit that the case of *Ex parte Stanfield*, 53 So. 538, settles the question. In this case this court in passing on the identical question here presented said: "By the very terms of the statute itself such decrees are final, and the remedy of the complaining party is by appeal. They are not vacation decrees which must be approved in term time, like the clerk's order at rules. All final decrees made in term time remain in the breast of the chancellor until the adjournment, and may be amended or vacated at any time during the term, but not afterwards. Final decrees made

in vacation, where authorized by law, when signed by the chancellor and delivered to the clerk to be entered, are beyond recall, and stand as if made during a term of court, and the court had adjourned." We submit that the case last cited above settles this question. The chancellor signed the decree and it was delivered to the clerk to be entered and was entered. There the power of the chancellor ended. He had no power or authority to do anything with the decree whatever. In assuming to act, his action was absolutely void. Then, we further submit that even had the court had any authority to do any act that he would have had no power to do so without giving notice to the appellant.

We think that the decree rendered on January 3, 1911, in this cause was void and of no effect and that the same should be vacated and set aside and the original decree rendered on the 28th day of August, A. D. 1910, should be reinstated as the decree in this cause and if the appellee has any complaint of that decree his remedy is by appeal from it.

For these reasons we submit that this cause should be reversed and said decree of August 28, 1910, reinstated and the decree of January 3, 1911, vacated.

Deavours & Shands, for appellees.

In the outset, we desire to call to the court's attention the fact that this is not a case where the court, at a subsequent term, attempted to modify or change a decree rendered in vacation, because the chancellor changed his mind in regard to the merits of the case. For the purpose of this argument and for that purpose only, we concede that the chancellor, after he renders a final decree in vacation; has no right to change that decree at a subsequent term of the court; but in this case, the court never rendered but one decree, but the chancellor inadvertently signed a decree which did not embody the true decree of the court; that is, that two decrees were pre-

sented to him and through a mistake of fact, he signed the wrong decree; that is, a mistake of fact as to the paper signed by him, and not as to the facts of the case. When the chancellor realized that he had made this mistake, on motion of appeals herein, he simply directed that the decree as entered on the vacation minutes, be modified so as to conform to the decree which he had directed solicitors for the appellant to prepare.

We call to the court's attention that on the motion, no evidence was introduced in regard to the facts of the case; no further testimony of any kind was taken in regard to that, nor was additional authorities of law cited by counsel, but the motion was purely and simply for the court to have entered on the minutes, the true decree of the court, being the decree that the chancellor intended to sign, and which he thought he had signed.

We do not think that the cases of *Railway Company v. Bowling*, 69 Miss. 255; *Arthur v. Adams*, 49 Miss. 404; *Wiggle v. Owen*, 45 Miss. 691, are in point, for in all of these cases, judgment or decree was rendered in term time. And at a subsequent term of the court, effort was made to have the court change the decree rendered at the preceding term. This, we all concede, under the circumstances of these cases, could not be done. The changes sought to be made in the judgment or decrees in the above suits, were changes arising from the facts of the case, or changes which should be made because the court erred in regard to the law involved in the cases. In all of those cases, proper remedy was by appeal. But we submit that the change which the chancellor made in the decree in the instant cases, was not made by him on account of the change of his opinion in regard to the law, or a change of his opinion in regard to the facts of the case, but was made because through a mistake, he did not sign the proper decree. Solicitors for the appellant having submitted to him a decree different from the decree directed by him to be drawn.

We do not think the case of *Ex parte Stanfield*, 53 Miss. 598, on which appellant rests his case is an authority in this case, because section 507 of the Code authorizes the chancellor to render decrees in vacation in minors business, and this in express terms. The court in the *Stanfield* case says: "The single question for decision, is whether the chancellor in term time has the power to set aside and vacate a decree made in vacation removing the disabilities of minority." That the court has not such authority, was decided in that case, and that was all that the court decided, for the court says that was the single question for decision.

Every one concedes that where the court renders a decree in term time, that at any time before the adjournment of the court, after the decree had been entered on the minutes, the chancellor has the authority to change or modify or rescind the decree so entered. A decree may be rendered on the first day of the term, the court may be in session for several weeks, and at any time before final adjournment, the court may modify and change this decree; this too, where the parties have a chance to see the decree before the same is entered on the minutes. A vacation decree drawn by solicitors for the successful party, not having been submitted to the solicitors for the unsuccessful party, when signed by the chancellor and entered on the vacation minutes, according to appellant's view, cannot at any time be changed or modified, however erroneous it may be. In reason, we do not see why there is anything more sacred or solemn about a decree rendered in vacation, than about a decree rendered by the chancellor in term time. We do not think it can be the purpose of the Code sections to make it unlawful for the chancellor to correct and to modify a decree rendered in vacation, which the parties have not had a chance to examine, before the same is enrolled on the vacation minutes, and yet hold that the chancellor can modify and alter a decree rendered during

term time, which decree, may have been on the minutes for many days before the final adjournment, just so such modification or amendment is made prior to the final adjournment.

MAYES, C. J., delivered the opinion of the court.

Section 506 of the Code on 1906, vests the chancellor with power to deliver opinions and to make and sign decrees in vacation in cases taken under advisement by him at a term of court; and by consent of parties, or their solicitors of record, he is given power in vacation to try cases and deliver opinions, and make and sign decrees therein. Such decrees, and all other orders and decrees which the chancellor may make in vacation, are required to be entered and rendered on the minute book of the court in which the cause or matter is pending, and are given the same force and effect as if made, entered, and recorded in term time, and appeals may be prosecuted therefrom as in other cases. In the case of *Ex parte Stanfield*, 53 South. 538, this court held that "final decrees made in vacation, where authorized by law, when signed by the chancellor and delivered to the clerk to be entered, are beyond recall, and stand as if made during the term of court and court had adjourned." In other words, in construing section 507 of the Code, dealing with vacation powers, this court held that under the terms of the statute all decrees authorized by it to be entered are final decrees, and are to be given the same effect as if rendered during a term of court. What was said by the court in construing section 507 applies to section 506 with like effect. In view of the above decision, it follows that when the decree in this case was signed by the chancellor, and entered on the minutes of the court by the clerk, it was a final decree, beyond the power of the chancellor to recall or modify, except in the manner authorized by section 1016, Code of 1906, or on the ground of fraud.

The judgment in this case is not sought to be changed in either of the ways indicated. The decree was rendered in August, 1910, and in January, 1911, a motion is made to change the decree. On this motion no proof of any kind is offered to show fraud. The basis of the motion is that the decree entered does not represent the true decree of the court. It is not alleged in the motion that the decree was erroneously entered by the clerk, or changed in any way by him; but the motion asserts that the mistake, if mistake there was, was the mistake of the chancellor in not making the decree he intended to make. No decree of this character can be modified or changed by a simple motion. Such a decree is a finality, and, if impeached, it must be for some stronger reason than that indicated by this record and in a different way. No mere motion, asking for a change in the decree on the ground that it was not intended to be rendered by the chancellor, the motion being unsupported by any kind of contrary proof or showing, can suffice.

The case of *Wilson v. Town of Hansboro*, 54 South. 845, is a very different case from the one presented by this record. In the *Wilson* case it was sought to have the court correct a judgment rendered at a former term, not because the court had made any mistake about it, but because the clerk had entered a judgment the reverse of that which the court had directed to be entered. In other words, the question in that case was whether or not the judgment which the court actually rendered should prevail, or the judgment erroneously entered by the clerk and not authorized by the court; and this court held that the actual judgment of the court should prevail, as a matter of course, and directed that the judgment of the court below should be entered on the minutes in lieu of the unauthorized judgment entered by the clerk. Under the facts presented by this motion, the court was without power to make any change in its decree.

Reversed and remanded.

H. R. TABOR v. STATE.

[56 South. 171.]

1. CRIMINAL LAW. *Murder. Instructions. Improper evidence.*

One convicted of manslaughter cannot complain of instructions on murder.

2. ADMISSION OF IMPROPER EVIDENCE.

Where in a criminal case improper evidence is admitted for the state over defendant's objection and the court cannot say with confidence that no other verdict than that of guilty could reasonably have been reached if such improper evidence had been excluded, the case will be reversed.

APPEAL from the circuit court of Lafayette county.

HON. W. A. ROANE, Judge.

H. R. Tabor was convicted of manslaughter and appeals.

The facts are as follows:

The state's theory, on the trial, was that accused lay in wait on the roadside for deceased and killed him. He testified that deceased came along on his horse and attempted to draw a pistol on him, when accused fired. A pistol was found on the body of deceased, with one cartridge discharged and five loaded chambers, a cartridge in one of which looked as if it had been snapped. On the trial, the wife of the deceased took the stand as a witness for the state and testified that a few days before the killing her husband had told her that he had put six cartridges in the pistol, which were all he had, and had thrown away the empty box, and that afterwards he had fired one of the cartridges, and that he had not used the pistol any more until he took it with him the day he was killed. This testimony was admitted over the objection of the defendant; the theory of the

state being that the deceased did not draw his weapon at all.

Falkner, Russell & Falkner, for appellant.

It was a very grave error to allow Mrs. Calliccoat, wife of deceased, to quote the conversation had with her husband on Christmas Eve day about how many cartridges he had in his pistol. It simply gave the state another witness; it brought forth the dead man's statement, and under the peculiar facts of this case furnished substantial backing for the state's theory that this was an assassination. Because the witness, Billingsly, said that he examined the pistol and that it appeared not to have been fired. The witness, Fudge, stated that he noticed no difference in the report of the guns and especially in view of the fact that the district attorney laid great stress upon the mark on defendant's gun in his endeavor to show that this mark had been put there by defendant and had never been made by any bullet from deceased's pistol. A strong word picture of this mark is shown in the cross-examination of defendant. Where so much is at stake the admission of incompetent testimony to a point so grave is a very dangerous experiment with defendant's rights.

Carl Fox, assistant attorney-general for appellee.

It is said by counsel for appellant that it was error to admit testimony of Mrs. Calliccoat, wife of deceased, about the conversation with her husband, on Christmas Eve day as to the number of cartridges in his pistol. I do not think the testimony was competent; but under the facts of the killing, as related by the defendant himself, it seems to me that it was not reversible error. Defendant testified that he shot the deceased in self-defense after deceased had fired at him with his pistol, striking the stock of his gun. He testified that he fired the second time in self-defense. As he crossed the road, on the way

home, as he said, deceased having disappeared from his sight after falling or being bucked from his mule, he came upon deceased kneeling with his pistol in his hand, and pointing at him. His own testimony makes out two separate affrays. He shot the first time because defendant had first fired at him. After an interval, in which the deceased had disappeared and defendant had abandoned any further attempt to kill the deceased, he again came upon deceased in an attitude to fire upon him, and again he fired the second time to save his life from a second attempt upon it by the deceased. Defendant testifies that after he fired the second time, deceased scrambled to his feet, and staggered a short distance away, and fell, and after a convulsive twitching, and jerking for a moment, he lay still, dead. Therefore, according to defendant's own testimony, it was the second shot which killed the deceased, and the deceased did not fire at defendant at that time. Of course, it may be true, that defendant's first shot might have killed deceased eventually; but by his own testimony, he shows that deceased was still able to defend himself, or to attack defendant, but that immediately after defendant fired the last shot, the deceased dropped his pistol, staggered a few steps, and fell dead. It makes no difference, therefore, whether deceased fired upon defendant or not, the instant before the defendant fired the first shot from the thicket from the East side of the road. It makes no difference whether deceased had five cartridges and one empty shell in his pistol, or whether he had six cartridges and fired one of them at that time. By the defendant's own testimony, it was the last shot that killed the deceased, and by the defendant's own testimony, he fired that shot, not because the deceased had at some short period of time before fired at him, but because the deceased, while kneeling, raised his pistol and pointed it at defendant as if to fire upon him. Therefore, if it was error to admit Mrs. Callicoat's testimony, of the conversation with her hus-

band concerning the number of cartridges in his pistol, it was harmless error.

Argued orally by *Lee M. Russell*, for appellant, and *Carl Fox*, assistant attorney-general, for appellee.

WHITFIELD, C.

The chief grounds relied on by the appellant are the giving of instruction No. 7 for the state, and the admission by the court, over the objection of the defendant, of the testimony of Mrs. Callicoate, detailing the conversation with her husband set out in the record.

As to the seventh instruction given for the state, we think there are two answers to the contention of the appellant: First. The appellant was only convicted of manslaughter, and instruction No. 7, complained of, was a murder instruction. Second. The evidence of the defendant himself pretty clearly shows that it was his second shot which killed the deceased. This contention is therefore not sound.

As to the contention with respect to the admission of the conversation between Mrs. Callicoate and her husband, it is to be remembered that the whole conduct of the trial in the court below manifestly shows that the state was laboring to develop the theory of a "lying in wait and assassination." Remembering this, and recalling the fact that the defendant is practically the only eyewitness to the material facts of the killing, and that he positively testified that when he fired the second shot the deceased was kneeling, facing him with his pistol in his hand pointed at him, we find ourselves unable to say that the admission of this testimony was not materially and fatally erroneous. It was, of course, manifestly incompetent, and it is not one of those cases in which we can rest in confidence upon the statement that no other verdict could reasonably have been reached if this conversation had been excluded, as it should have been.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein set out the case is reversed and remanded.

MRS. JANE FIELD v. WILLIAM JUNKIN.

[56 South. 172.]

CHANCERY COURT. *Decree pro confesso. Vacating.*

Where the setting aside of a decree *pro confesso* would work no serious injury to plaintiff, but would simply deprive him of the advantage which he had secured by reason of defendant's neglect to file his answer, a motion to set aside the decree *pro confesso* should be sustained by the court.

APPEAL from the chancery court of Adams county.

HON. J. S. HICKS, Chancellor.

Suit by William Junkin against Mrs. Jane Field et al. From the overruling of a motion to set aside a decree *pro confesso*, defendant appeals.

The facts are as follows:

The appellant, Mrs. Jane Field, and the appellee, Wm. Junkin, were tenants in common of a certain tract of land described in pleadings. Mrs. Field sold her interest in the timber on the land to Messrs. Wilcox and Burkley, who afterwards began to deaden and cut the timber. Thereafter, Junkin filed a bill in chancery against Mrs. Field and Wilcox and Burkley as codefendants. The bill of complaint prayed for a writ of injunction restraining Wilcox and Burkley from trespassing upon the lands and depredating upon the timber, and asked for the appointment of a receiver to take possession of the trees already cut, and for the appointment of

a commissioner to ascertain damages, and for the appointment of a commissioner to divide the property into lots, awarding each tenant in common their respective portion of same, and, in case the commissioners find the property incapable of division, for a sale of same and a division of the proceeds. Thereupon the writ of injunction and summons was issued and served upon all the defendants. Neither the injunction writ nor the summons showed that the proceeding sought for a partition of the land itself. Defendants Wilcox and Burkley employed counsel to defend the suit as to themselves. On the hearing, the suit was dismissed against Messrs. Wilcox and Burkley, and then, for the first time, appellant, Mrs. Field, was informed that a decree *pro confesso* had been taken against her; the decree providing for the appointment of a commissioner and sale of the land. She thereupon filed an affidavit, which set out the fact that she had an understanding between Messrs. Wilcox and Burkley that they would defend the suit, and that she had no knowledge that the suit was for a partition or sale of the land, but believed it only affected the timber rights, and accompanied this affidavit by a motion to vacate the decree *pro confesso*. The court overruled her motion and granted an appeal.

Reed & Brandon, for appellant.

Under the facts in the case, in the exercise of a sound discretion, the chancellor should have sustained appellant's motion and vacated the decree *pro confesso* and allowed an answer to be filed. "When neglect is in the mere conduct of a suit, and its consequences do not operate injuriously, and its condonation by the judge can do no harm except to deprive the adverse party of an advantage which he has secured in virtue of such neglect, in that case the party guilty of the neglect should not on that account alone be deprived of the means and opportunity of maintaining or defending his rights. The ob-

ject of the institution of courts is to administer justice according to law, and lawsuits are allowed for that purpose alone." See *Yost v. Alderson*, 58 Miss. 47. The chancellor erred in overruling appellant's motion and the cause should be remanded with leave for appellant to file her answer to the bill for partition.

Ratcliff & Truly, for appellee.

In our humble judgment there is no question of law or fact presented for review by the appeal prosecuted in this case.

The supreme court will not in the logical investigation of this matter ever reach the point where it is necessary to pass upon the facts of the litigation or discuss and determine the principles of law suggested in appellant's brief.

This is simply a question of how far a chancellor can control the dispatch of business and the administration of justice in his own court, and a question of how far and for how long a litigant can vex the patience of a court and trifle with its process.

If the presiding chancellor has any power to dispose of the business in his court, according to well-settled rule, then this case will be affirmed. If the process of the court cannot be trifled with and held for naught; if it cannot be absolutely ignored until it suits the sweet will and pleasure of a litigant to obey the requirements of the law, then this case must be affirmed.

Such is our conviction and such our faith in the correctness of our position that we shall confine this brief not to a statement of a meritorious claim for consideration but that it was simply a move to gain time upon the part of the appellant, the court declined to vacate the final decree and order that the same should be entered. This was accordingly done.

We submit, therefore, that this final decree must stand as the judgment of the chancery court and cannot be changed or altered.

SMITH, J., delivered the opinion of the court.

While appellant was negligent in not ascertaining that the bill filed against her in the court below prayed for a partition of the land in controversy, as well as for an injunction against cutting the timber thereon, her mistake in supposing that the bill involved only the cutting of timber was a very natural one under the circumstances. The setting aside of the decree *pro confesso* would have worked no serious injury to appellee, but would simply have deprived him of the advantage which he had secured by reason of appellant's neglect to file her answer. Under the circumstances, we think the court below erred in overruling the motion to set aside the decree *pro confesso*. *Yost v. Alderson*, 58 Miss. 40.

The decree of the court below is reversed, the decree *pro confesso* set aside, and the cause remanded, with leave to appellant to answer the bill within thirty days after mandate filed in the court below.

Reversed and remanded.

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

OCTOBER TERM, 1910.

R. J. & H. B. DAVIS *v.* LUCINA BELLOWS.

[56 South. 174.]

TIMBER CONTRACT. *Construction of same.*

Where plaintiff contracted with defendant to purchase all merchantable timber on a certain tract of land and to pay for the stumpage at the rate of one dollar and twenty-five cents per M, payments to be made on June 15, 1903, and quarterly thereafter, for timber previously cut and to remove all the timber by January 1, 1908, and plaintiff deposited with defendant thirty-two hundred dollars to pay for the last timber to be cut. *Held*, that the contract between the parties gave plaintiff's the right to cut all the merchantable timber for a period of five years, plaintiff to pay one dollar and twenty-five cents per M feet for all timber actually cut in that time, payments to be made as provided in the contract and that the right thus granted terminated on January 1, 1908. That the thirty-two hundred dollars paid to defendant at the date of the contract did not become absolutely the money of defendant, whether the plaintiff cut the timber or not, but was left with defendant as a

(838)

mere advance payment or security for timber which plaintiff expected to cut and pay for at the rate of one dollar and twenty-five cents per M feet and which if plaintiff did not cut would be returned to plaintiff.

APPEAL from the chancery court of Hinds county.

HON. G. G. LYELL, Chancellor.

Bill in chancery by R. J. & H. B. Davis against Lucina Bellows. From a decree dismissing the bill plaintiff appeals.

The facts are as follows:

The appellants and appellee entered into an agreement, which is in substance as follows:

(1) By and between R. J. Davis and H. B. Davis, hereinafter designated as parties of the first part, and Lucina G. Bellows, hereinafter designated as the party of the second part, with reference to sawmill, timber, etc., near Jackson, Miss.

(2) Stumpage.—Said parties of the first part agree to purchase of said party of the second part all merchantable timber on a certain tract of about five thousand acres, more or less, lying adjacent to Seiger's Switch on the Illinois Central Railroad, being specifically described as follows:

(3) Description of the property.

(4) Said parties of the first part agree to pay for the said stumpage at the rate of one dollar and twenty-five cents per M. Settlement and payment periods being as follows: June 15, 1903, said parties of the first part shall pay cash at the rate of one dollar and twenty-five cents per M. for all timber sawed prior to said date; and every three months thereafter during the term of this agreement said parties of the first part shall pay cash for all timber sawed during said three months.

(5) Said parties of the first part agree to remove or pay for, at above specified rate of one dollar and twenty-five cents per M., all merchantable timber on above specified premises before January 1, 1908.

(6) By the term "merchantable timber" is meant all pine and cypress scaling ten inches or more at top and cutting two or more logs sixteen feet long, and all hardwood scaling sixteen inches or more at top and cutting two or more clear logs twelve feet long; but any timber of smaller size or inferior grade shall be included as "merchantable timber," if said parties of the first part elect to cut such timber.

(7) Sawmill and tools.—Said parties of the first part agree to purchase of said party of the second part a certain sawmill on above specified premises, including all log wagons, carts, trams, etc., that are used in connection with said mill, paying therefor the sum of fifteen hundred dollars, as below specified.

(8) Here follows an agreement for the lease of sawmill, etc. The term of this lease shall be from November 20, 1902, until January 1, 1908; but, as soon as all merchantable timber is removed and paid for as above specified, said parties may at their option at once terminate this lease. Buildings erected by said first party to be the property of said first party.

(10-12) This is an agreement whereby the first party agrees to convey to the second party certain land in Tennessee for a consideration of five thousand, four hundred and twenty dollars.

(13-15) These provisions apportion the purchase price as follows: Fifteen hundred dollars in payment of sawmill. Seven hundred and twenty dollars rent on buildings, etc. "Three thousand, two hundred dollars in payment of two million, five thousand and sixty thousand feet of the last of the merchantable timber cut or uncut on premises above described. That is, said three thousand, two hundred dollars cannot be used in payment of timber until all the merchantable timber as above specified is removed from the premises above described, except two million, five hundred and sixty thousand feet. When said parties of the first part consider that they are

entitled to credit as above provided for, the parties to this contract shall have the standing timber estimated either by themselves or by parties agreed upon, and this estimate shall be a basis of settlement as above agreed upon."

Thereafter the appellants entered upon the land and began operating a sawmill, cutting and removing merchantable timber as provided for in the contract, and paid for same every three months as it was cut. Thereafter, upon the expiration of the contract, they were notified that it would terminate, and were advised by appellee that the three thousand, two hundred dollars on deposit to pay for timber was forfeited, and that all of the standing merchantable timber which appellants had not cut during the term of the contract would be claimed as forfeited. Appellants then filed a bill in chancery, setting out the contract and the facts as detailed. The prayer of the bill is, first, that appellants be allowed to remove the merchantable timber and pay for same at the rate stipulated; and, second, if mistaken in that relief, then for a return to them of the three thousand, two hundred dollars in the hands of appellee, which, according to appellants' contention, could not be retained by appellee except to be applied as a payment on merchantable timber actually cut and removed. The chancellor dismissed the bill and granted an appeal.

Alexander & Alexander, for appellants.

L. Brame and Ratcliff & Truly, for appellee.

The briefs of counsel on both sides have been lost from the record.

MAYES, C. J., delivered the opinion of the court.

After a most careful consideration of this record in all of its aspects, we reach the following conclusions: The contract between the parties gave appellants the

right to cut all the merchantable timber on the land for a period of five years; appellants to pay one dollar and twenty-five cents per M feet for all timber actually cut in that time, payments to be made on the dates named in the contract, and the right thus granted to terminate on January 1, 1908. By the contract appellants were only bound to pay for the timber actually cut by them during that time, after which they had no further rights in the premises. The three thousand, two hundred dollars paid to appellee at the date of the contract constituted no payment for the timber, in the sense that it became absolutely the money of appellee, whether the appellants cut the timber or not; but it was left with her as a mere advance payment, or security, for timber which appellants expected to cut and pay for at the rate of one dollar and twenty-five cents per M feet, and which, if they did not cut, certainly obligated Mrs. Bellows to return the advance payment to them. In effect the contract is simply this: Appellee gave a five-year option to appellants on all merchantable timber on the lands, for which they agreed to pay her one dollar and twenty-five cents per M feet as they cut it. The appellants placed in appellee's hands three thousand, two hundred dollars to be held by her during the continuance of the contract. If appellants cut all of the timber, as it was contemplated that they should do, but which the contract did not oblige them to do, then the three thousand, two hundred dollars was to be absorbed by applying it as a payment on the last two million five hundred and sixty thousand feet of timber at one dollar and twenty-five cents per M feet. A calculation will show that the above number of feet at the rate specified will make exactly three thousand, two hundred dollars. If the contract expired before all the timber had been cut, appellee had the right to stop the cutting and put appellants off the premises, withholding so much of the three thousand, two hundred dollars as it took to pay for any timber that was cut and un-

paid for at the time of the expiration of the contract, at the rate of one dollar and twenty-five cents per M feet. If appellants had paid all that was due at the date of the expiration of the contract, then the whole of the three thousand, two hundred dollars should be returned to them; but appellee had no right to claim a forfeiture of the three thousand, two hundred dollars, or any part thereof.

This case is reversed and remanded, with instruction to the trial court to have an accounting between appellants and appellee. If it shall appear that the appellants are due appellee any sum for timber cut by them before January 1, 1908, and not paid for, then the court shall decree that the appellee shall deduct so much from the three thousand, two hundred dollars as is necessary to pay for the timber cut by appellants and not paid for, giving a decree in favor of appellants for the balance; and if it shall appear that appellants have paid all that they owe to appellee, then appellants shall have a decree for the whole sum, and the court shall make any sum found due appellants a charge on the timber in question.

Reversed and remanded.

Suggestion of error filed and overruled.

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1911.

EMMA HAGGETT *v.* STATE.

[56 South. 172.]

CRIMINAL LAW. *Continuance. Illness of accused. Trial in absence.*

It was reversible error to try accused for a misdemeanor in her absence when she was unable to be present at the trial on account of sickness, a continuance should have been granted.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

Emma Haggett was convicted of unlawful retailing and appeals.

The facts are as follows:

When the case was called for trial in the circuit court, accused did not appear; but her attorney filed an application for a continuance, supported by affidavit setting out the fact that she was too sick for trial and under treatment of a physician, who also testified as to her condi-

(844)

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tion. The continuance was denied, and she was tried in her absence and convicted.

No brief of counsel on either side found in the record.

SMITH, J., delivered the opinion of the court.

The testimony of the witness Ammons is not in conflict with the evidence of the two physicians, and from the evidence of these physicians it is manifest that appellant was too ill to be present at her trial, and consequently the motion for a continuance should have been sustained. *Corbin v. State*, 55 South. 43.

Reversed and remanded.

BOARD OF SUPERVISORS OF WAYNE COUNTY *v.* MOBILE &
OHIO RAILROAD CO.

[56 South. 173.]

TAXATION. Overvaluation. Right to relief.

Where cut-over lands were assessed for taxes as timbered lands at a valuation greatly in excess of their actual value, the board of supervisors had the right under Code 1906, § 4312, so providing to at any time reduce the assessment, because of "over valuation known to be such."

APPEAL from the circuit court of Wayne county.

HON. T. H. BARRETT, Judge.

Petition by Mobile & Ohio Railroad Company against the board of supervisors of Wayne county. From a judgment in favor of the railroad company, the board of supervisors appeals.

The facts are as follows:

The appellees filed a petition before the board of supervisors of Wayne county asking a reduction of their

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[99 Miss.]

assessment. The case was tried upon an agreed statement of facts, which is as follows: "The following statement of facts is hereby agreed to between the attorney of record of the Mobile & Ohio Railroad Company and the attorney of record for Wayne county, Miss., and shall be taken and considered by the court as the agreed statement of facts in said cause, and said cause shall be determined upon said facts, to-wit: That, on the assessment of lands by the tax assessor and board of supervisors of the said county of Wayne, the total raise of real estate values in said county over the preceding assessment was forty-two thousand, five hundred and ninety-two dollars; that of said amount the raise on the lands of the Mobile & Ohio Railroad Company is approximately thirty-seven thousand dollars (said land roll of said county being hereby referred to and made a part hereof, and a copy of the orders and doings of the board of supervisors in reference to said assessment is hereby attached as Exhibit A); that at the November, 1909, term of the board of supervisors of said Wayne county, the defendant filed its formal motion to reduce said assessment, and that said application was denied, for the reason that the said board of supervisors did not think it had the legal authority to reduce said assessment; that said board was and is of the opinion that said assessment against the lands of the Mobile & Ohio Railroad Company was overvalued to the amount of twelve thousand, seven hundred and seventy-eight dollars; that this overvaluation was because the board, in assessing certain lands of the Mobile & Ohio Railroad Company, had assessed them as timbered lands, when in fact they were cut-over lands, with little or no timber standing thereon (that a copy of said order of the board, denying said motion, is hereto attached as Exhibit B); that a reasonable taxable valuation of the cut-over land of the Mobile & Ohio Railroad Company in Wayne county is two dollars per acre; that the board of supervisors, at its

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November, 1909, meeting, regarded this valuation correct, and still regards it as correct, and declined to enter the order only because it thought it had no legal right to do so; that the attached list of lands (Exhibit C) correctly described all of said cut-over land in the county of Wayne, state of Mississippi, and that a reasonable taxable valuation of said lands is two dollars per acre; that said list of lands, marked Exhibit C, shows the assessment of each parcel of land as now shown by the tax roll of the Wayne county, Miss., and shows the total of said assessment, and the total of what it should be, at two dollars per acre, and that said assessment of lands should be reduced to the amount of twelve thousand, five hundred and sixty-five dollars, to conform to the true and correct taxable value of said lands; that the assessment of lands, as aforesaid, at the excessive valuation, was because the board of supervisors was mistaken in the nature and character of the lands so assessed, as shown in Exhibit C attached hereto, and at the time of the hearing of the application of the Mobile & Ohio Railroad Company, for a reduction of the assessment on said lands, two dollars per acre, it became known to the board of supervisors that said lands were cut-over lands, instead of timbered lands, and hence it became and was known to said board that the assessment of said lands was an overvaluation known to be such, under section 4312 of the Mississippi Code of 1906; that said lands were returned by the Mobile & Ohio Railroad Company at an amount less than the valuation appearing upon the assessment rolls, and that said lands were overassessed by the board of supervisors because of said board's mistaken idea of the character of said lands, as aforesaid, and that said lands were worth no more at the time of the making of said assessment than at the time of making the aforesaid application for a reduction of said assessment; that is to say, there has been no change in the value of said lands since the making of said assess-

Brief for appellant.

[99 Miss.]

ment. It is further agreed to be the fact that at the September term of the board of supervisors, at which term the taxes of the county were equalized, that the Mobile & Ohio Railroad Company had a representative of its land department before the board of supervisors during the whole session, but the board was not informed as to the character of the lands described in Exhibit C."

The board of supervisors had approved the assessment at its September meeting as provided by section 4297 and 4298 of the Code of 1906. Section 4312 of the Code is as follows: "In case of destruction or deterioration in value of any real estate by any casualty, or in case of overvaluation known to be such, or in case of clerical error in the assessment rolls, or in case of change of ownership after assessment, or in case of an increase of value by the erection of improvements, or on satisfactory evidence of such increase from other causes, the board of supervisors shall have power at any time, on the application of a party interested, or otherwise, to change the assessment so as to reduce or increase to the true value of the property, or to cause the taxes to be charged to the purchaser thereof. And in case of the reduction or increase of any assessment, the same shall be certified by the clerk of the board of supervisors to the auditor; but the board shall not, after the approval of the roll, change an assessment except in the cases enumerated."

Wm. McAlister, county attorney, for appellant.

In this cause the board was willing to grant the relief prayed for and made an effort to do so, but was advised by the attorney general that it could not make the order at that late date.

The assessor had made his return of the assessment and gave notice of filing the same as per section 4291, of the Code of 1906; and was subject to objections as provided for in section 4296, and on the first Monday of

August the board met to equalize the assessment when the complainant was present and had an opportunity to ask that corrections be made, but made none or asked for none to be made.

It is too late to make objections to assessments of land when the rolls have been completed and placed in the hands of the sheriff and auditor.

Chas. M. Wright, for appellee.

While section No. 4312 has been held to be a restrictive statute, that is a restriction on the power of the board of supervisors to change assessments, it is also the law that the power of the board is plenary in all cases coming within the purview of the statute. *Hancock county v. Simmons*, 86 Miss. 302. Truly, J., speaking for the court says, "In case of over-valuation known to be such, when it is manifest that injustice has been done, through mistake in calculation, proper reduction can be allowed." 86 Miss. pp. 310, 311. The agreed statement of facts, brief of counsel for appellant, and all the attendant circumstances show that manifest injustice has been done by a mistake as to the character of lands it was assessing. Much more then can the board allow the proper reduction, when the over-valuation grows out of want of knowledge on the part of the board, as to the subject-matter with which it is attempting to deal.

The lands had been returned by the assessor, and the valuation of the assessor were raised by the board. So far as this record shows the appellee was without knowledge of any proposed raise or change in the assessment of any subdivision of land embraced in this suit.

Its representative present at the equalization, as shown by the agreed statement of facts, is not shown to have known about the proposed raise or change by said board. He was not put upon inquiry as to the probable raise of such lands, as were returned by the assessor at the actual valuation. *Simmons v. Scott County*, 68 Miss.

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[99 Miss.]

37. That the assessor's return was correct, the statement of facts shows beyond question.

The duties and authority of the agent attending the sitting of the board are nowhere shown in this record, and cannot be presumed.

Jennings v. Coahoma County, 79 Miss. 523, is decisive of the instant case, both as to the propriety of this proceeding and the relief to which appellee is entitled. See, also, *Simmons v. Scott County*, 68 Miss. 37; *Hancock v. County v. Simmons*, 86 Miss. 302.

WHITFIELD.

The petition filed by the appellee should have been granted by the board of supervisors. It is a plain case of overvaluation, known to be such, within the meaning of section 4312 of the Code of 1906. The reporter is directed to set out the agreed statement of facts in full, so as to show the exact case which we decide.

Affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is affirmed.

THOMAS A. CAFFEY ET AL. v. HENRY TINDALL ET AL.

[56 South. 177.]

1. NUNCUPATIVE WILL. *Construction. Presumption. Instructions. Probate.*

A description in a will as "all my property" includes both real and personal property.

2. PROBATE OF NUNCUPATIVE WILL. *Instructions.*

In a proceeding to probate an alleged nuncupative will which purported to devise "all" of the testators property, it was error for the court to give an instruction to contestants that "the law presumes and in the absence of evidence to the contrary, conclusively presumes that the testator, if he was sane, knew that real estate would not pass under a nuncupative will." As the knowledge or want of knowledge on the part of the testator is a fact to be proven in the same manner that other facts are proven.

3. SAME.

The law does presume, for some purposes, that all persons know the law; but not for the purpose of supplying evidence of a fact material to the controversy.

APPEAL from the chancery court of Montgomery county.

HON. I. T. BLOUNT, Chancellor.

Petition by Thos. A. Caffey et al. against Henry Tindall et al. for the probate of a nuncupative will. From a decree dismissing the petition proponents appeal.

The facts are as follows:

One W. M. Caffey, a single man, died without living parents, brothers, or sisters, or children of brothers or sisters. At the time of his death, his nearest relatives, according to the law of descent and distribution, were his mother's brothers and sisters.

Deceased was an epileptic, and subject to attacks of epilepsy for a number of years prior to his death. Ex-

cept during these attacks, he seemed to be entirely sane and rational, and had proved to be a good business man. He had considerable real and personal estate, most of which had been inherited by him from his father; he being an only child. After his death, one of the appellees, an uncle on his mother's side, qualified as administrator of the estate, alleging that he had died without will.

Afterwards the appellants, who are his cousins on his father's side, being the descendants of his father's brothers and sisters, filed a petition in the chancery court for the probate of what purported to be a nuncupative will, made in the presence of a cousin, R. F. Caffey, and a negro servant, Manuel Caffey, who called upon deceased, about a week before his death, at the hotel. The purported will is in the following language: "It is providential that you and Manx are here together. I am on my deathdead. I cannot recover. My father was always wanting to make a will and my father's will was that he wanted his brother's and sister's children to have all of his property. My father's wish is my will. I want my father's brother's and sister's children to have by property."

The contest is over the personal property, since real estate could not pass by nuncupative will. The proponents offered to establish this will by the witnesses above named, and the objectors introduced testimony attempting to impeach these witnesses.

Issue being tendered, the court heard the testimony, submitted the case to a jury under instructions, and the jury found against the proponents, and the court accordingly dismissed their petition for probate. On appeal one of the errors assigned is the granting of instruction No. 20, asked by the defendants, which is as follows: "The law presumes, and in the absence of evidence to the contrary, conclusively presumes, that Billy Caffey, if he was sane, knew that real estate would not pass under a nuncupative will."

V. D. Rowe, Dunn & Thompson and Flowers, Alexander & Whitfield, for appellants.

We say that he court erred in giving instruction No. 20 for the defendants. That instruction is as follows:

“The law presumes and in the absence of evidence to the contrary conclusively presumes that Billy Caffey, if he was sane, knew that real estate would not pass under a nuncupative will.”

Counsel got this instruction in order that argument might be made to the jury that Billy Caffey would have wanted his real estate to go to his father's nieces and nephews, if he had wanted his personal property to take that course and that since he did not make a will which would carry the real estate it is unreasonable to believe that he made a will at all. They argued to the jury, as any other lawyer would, that the wish of Billy's father was that all of his property should go to his nieces and nephews; and if Billy had undertaken to execute his father's wish and will he would have made a will in such form as to control the descent of the real estate. This furnished a very strong argument. This instruction might have turned the decision against these appellants, defendants urged improbabilities. They had the court by this instruction to give them one fact which had not been proven and that fact was knowledge on the part of Billy Caffey that he could not control his real estate by an oral will. Billy may have had such information, or he may not. There may be a presumption of law that one has knowledge of the law but there is no such presumption of fact. It was desired here to use this assumed knowledge as a fact, as a piece of evidence. The instruction is just as strong as it can be made. The jury is told that the law conclusively presumes that Billy Caffey had this information. In other words the jury was told that it might be assumed, for whatever it was worth, that when Billy Caffey spoke these words, if he did speak them, he knew that he could not in this manner

control the distribution of his real estate. Or it is the same as if the jury had been told that:

Since there is no evidence to the contrary, you may assume as a proven fact that on the 14th day of May, 1908, Billy Caffey knew that he could not control the distribution of his real estate with the verbal will. You may take this established fact into consideration in making up your mind as to whether he did in fact undertake to make a will as testified by these witnesses for proponents."

We understand that *ignorantia juris non excusat*. We know that one who is sued on an undertaking of any kind cannot defend by showing that he did not understand the full legal meaning of his act. That is not, however, the situation here. We are not trying to give to the act of Billy Caffey a meaning or effect the law did not give it on the ground that he did not understand the law. But the contestants had the court to charge knowledge of the law up to Billy Caffey in order that they might use it as a fact to base their argument upon. There is no conclusive presumption that one knows the law even where there is any presumption at all. *Hess v. Culver* Mich.), 18 Am. St. Rep. 421.

In *Black v. Ward* (Mich.), 15 Am. R. 162, it appeared that a note made in Michigan, but payable in Canada, was to be paid in "Canada currency," and it was decided that the words meant no more than "Canada money" or "Canada dollars." It was replied that this construction of the contract would render the words surplusage; that the law would give the contract this meaning in the absence of these words; that a note payable in Canada necessarily called for the use of Canada money. And it was said that this is the law and that the maker of the note is presumed to have known the law and to have written the words "Canada currency" into the note with full knowledge of the law, and therefore must have meant something by using the words. It was insisted

that in construing the contract and ascertaining the meaning intended to be given to these words, it should be presumed that the words were used with full knowledge of the law and were therefore intended to give to the contract a meaning which the law would not give to it with those words omitted. The fact of knowledge was sought to be established by the presumption in order that this fact might be used in argument as furnishing a reason for the position that the words "Canada currency" were intended to add something to the contract. The court said:

"It is urged that this is superfluous, and that, as every one is presumed to know the law, it would not have been put in except for some purpose which would change its legal import. This objection appears to us to be far fetched and unreasonable. The case cited above sufficiently answer it. A very large proportion of the bonds and deeds drawn up in this country describe the money secured or paid, as 'lawful money of the United States,' when there can be no other lawful money in the republic, and when it is clearly superfluous.

But the maxim referred to in regard to a knowledge of the law is misapplied. No man can avoid a liability as a general thing because he is ignorant of the law. This is an essential rule of society. But the law is not so senseless as to make absurd presumptions of fact. In *Regina v. Mayor of Tewkesbury*, L. R. S. Q. B. 628, this supposed maxim was very clearly explained, and it was held that, where an actual knowledge was in question, the legal presumption could not supply it. Blackburn, J., uses this language:

"From the knowledge of the fact that Blizzard was mayor and returning officer, was every elector bound to know as matter of law that he was disqualified? I agree that ignorance of the law does not excuse. But I think that in *Martindale v. Falkner*, 2 C. B. 719, Maule, J., correctly explains the rule of law. He says: 'There is no

presumption in this country that every person knows the law; it would be contrary to common sense and reason, if it were so.' In *Jones v. Randall*, Cowp. 38, 40, Dunning, *arguendo*, says: 'The laws of this country are clear, evident and certain; all the judges know the laws, and knowing them administer justice with uprightness and integrity.' But Lord Mansfield, in delivering the judgment of the court, says: 'As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is, even in the last resort.' It was a necessary ground of the decision in that case that a party may be ignorant of the law. The rule is that ignorance of the law shall not excuse a man or relieve him from the consequences of a crime, or from liability upon a contract. There are many cases where the giving up a doubtful point of law has been held to be a good consideration for a promise to pay money.' The learned judge proceeds further to the same effect, and the judgment in that case, as in the one cited from Lord Mansfield, rested upon the sole ground that a person was not presumed as a matter of fact to know the law relied on to disqualify him as a voter."

The effect of this instruction was to give the defendants the benefit of evidence which they had not introduced and of a fact which they had not proved. No one knows whether Billy Caffey knew the law of nuncupative wills. He may have known it. He may not. But this instruction required the jury to assume for the purposes of their consideration that he did know the fact of law that real property cannot be controlled by a nuncupative will. Very few men in Mississippi know this. Regardless of what the jury might have thought as to the attitude of Billy Caffey's mind they were required to believe that he had the knowledge of the law.

We submit that in this case any error should call for a reversal. As the record shows there have been two mistrials showing that the men have trouble in making up their minds on the issue as to whether there was a will. And the court will see that under these circumstances the jury sitting on the case have had trouble in reaching a verdict, even with these extra and improper burdens and handicaps placed upon the prononents. The mistakes in the admission of evidence and in the exclusion of evidence operated strongly against us. And added to all of this we have had this instruction No. 20 to deal with which injected this additional unproven fact into the case and then worse still we have had it exacted of us to produce such evidence as that the jury might be able to characterize it as clear and indisputable. This instruction reaches the limit of unreasonableness. And certainly no instruction in a case of this kind could be more disastrous.

Hill & Knox, for appellee.

We contend that under the evidence in this cause that the court below should have given the peremptory instruction which was asked by the contestants and the case should not have gone to the jury at all, but inasmuch as the court below saw fit to submit the case to the jury, then we respectfully submit that the court correctly charged the jury as to the law for and on behalf of the contestants, and that all of the instructions that were granted by the court for and on behalf of the contestants are fully and clearly warranted by the authorities herein before cited.

Even though the court should find that there was any error committed by the court below admitting or rejecting any testimony of any witness or in granting or giving any of the instructions for and on behalf of the contestants, yet we respectfully contend that this court will not reverse this case for any error that may have been

committed, if any, by the court below, for the correct result was certainly reached in this case by the jury.

W. C. McLean, for appellee, filed an elaborate brief dealing with other points in the case than the point decided by the court in its opinion.

Argued orally by *J. N. Flowers* and *J. T. Dunn*, for appellant, and *W. T. Knoy* and *Wm. C. McLean*, for appellees.

SMITH, J., delivered the opinion of the court.

The alleged testator died seised and possessed of both real and personal property, all of which is necessarily included in the description, "all my property," contained in the alleged nuncupative will, and would pass thereby, were it lawful to devise realty by parol.

At the request of contestants, the court charged the jury that "the law presumes, and, in the absence of evidence to the contrary, conclusively presumes, that Bill Caffey, if he was sane, knew that real estate would not pass under a nuncupative will." If the testator in fact knew that real property would not pass under a nuncupative will, it is hardly probable that he would have attempted to so devise such property, and consequently the jury, on account of this fact alone, would have been warranted in seriously doubting the making of the will at all. That the will attempted to pass real estate would be of no assistance to the jury in determining whether or not the will was made, if the testator in fact had no knowledge at all as to what property the law would permit to pass under it.

In this connection, the knowledge or want of knowledge on the part of testator is a fact to be proven in the same manner that other facts are proven. The law does presume, for some purposes, that all persons know the law; but not for the purpose of supplying evidence of a fact material to the controversy. Under this instruction,

as there was no evidence to the contrary, the jury were instructed to conclusively presume the existence of a fact necessary to be established by evidence, before the jury could draw any inference therefrom, and of which there was no evidence at all. The writer of this opinion is strongly inclined to the view that the evidence of the *regatio testium* fails to meet the requirements of the statute; that for this reason the court should have directed a verdict for appellees; and that consequently the error committed by the court in granting the instruction hereinbefore set out was harmless. A majority of the court, however, think otherwise.

Reversed and remanded.

E. J. SMITH v. STATE, EX REL.

[56 South. 179.]

1. STATE BONDS. *Interest. Sale. Par value. Statutes. Construction.*

Under acts of 1910, chapter 99, authorizing the sale of interest bearing state bonds at not less than "par," the "par value" of such bond on the date of its issuance, is a value equal to the principal thereof; on any day subsequent to its issuance it is a value equal to the principal plus accrued interest.

2. STATUTES. *Construction. Prior statutes.*

The rule of construction that in case of doubt and uncertainty the court may in construing a statute, look to prior statutes in order to ascertain the meaning of the words used in the statute under consideration, can never be invoked where the words used have a plain and well settled meaning or where to do so would not remove, but create an ambiguity.

3. SAME.

Where the legislature by means of a series of statutes running through a number of years has been engaged in building up a general scheme or system, all of these statutes must be construed together

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in order to arrive at the legislative intent, and the words of the later statute will be given the same meaning as was given to them by the legislature in the former statutes.

4. PAR. *Par value. Commercial paper.*

The words "par" and "par value" as applied to commercial paper have a well settled meaning in commercial law and consequently are not subjects of expert testimony.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by the state on the relation of M. S. McNeil, district attorney, against E. J. Smith, state auditor. From an adverse judgment defendant appeals.

The facts are as follows:

This suit was instituted by M. S. McNeil, district attorney, at the instance of Mrs. Emma Edwards, the holder of certain bonds of the state of Mississippi, dated July 1, 1910, issued and sold under chapter 99 of the acts of the legislature of 1910, and is brought against E. J. Smith, auditor, and Geo. R. Edwards, treasurer, to compel the auditor to issue a warrant and the treasurer to pay same for interest coupons maturing January 1, 1911. Payment of these coupons had been refused by the treasurer, because it is alleged that the bonds had not been sold in accordance with the provisions of chapter 99, Laws of 1910, in that they had been sold below par. The Law of 1910 provides that the governor, treasurer, and auditor shall advertise for sealed bids for the bonds authorized, and after due advertisement award them to the highest and best bidder, and, in case there are no bids, the governor, with the advice and consent of the auditor and treasurer, "may negotiate same at private sale for a price not less than par." There were no bids, and the governor, with the advice and consent of the auditor and treasurer, at various times between July 1, 1910, and January 1, 1911, sold the bonds authorized to be issued at their face value with the interest

coupons attached, thereby giving to the purchasers the benefit of that portion of the interest which had accrued to the date of sale, upon the agreement with the purchaser that the interest coupons would be paid in full upon maturity. It is the contention of the petitioner below that the word "par," as used in the act, is equivalent to "face value," and that a sale of the bonds at face value is legal; while the contention of the state officials is that the sale was below par, because the accrued interest to date of sale was given to the purchasers.

There was a demurrer which raised two points: First, that there was a misjoinder of parties defendant, and that the suit was not brought by the state; and, second, that the petitioner had no right to maintain his suit, since the holders of the interest coupons had a remedy. The court sustained the demurrer as to misjoinder of parties, and dismissed the suit, as to Edwards treasurer, and permitted an amendment so as to show the state of Mississippi as petitioner, on the relation of the district attorney, and overruled that part of the demurrer questioning the right of the district attorney to maintain the suit. The auditor then answered, and the case proceeded to trial on pleadings and proof, resulting in a judgment for the petitioner, granting the writ of mandamus prayed, and commanding the auditor to issue his warrants for the matured interest coupons.

Potter & Hindman and *J. A. P. Campbell*, for appellant.

The only question in this case is, where the bonds of the state sold "for a price not less than par?" Was a sale for five hundred dollars of a bond whose value was five hundred and ten dollars, or nearly that, a sale for a price not less than par? When the legislature appropriated twelve thousand dollars to pay interest on six hundred thousand dollars from July 1st, to December 31, 1910, did it intend to pay that, or any part of it, for

money not in the treasury but in the pockets of buyers of bonds who should be induced to buy a gift of interest coupons?

Is it not clear that the legislature expected the bonds to go at four per cent interest and be sold before July 1, 1910, and the coupon due January 1st next would go to the buyer; that the thought of giving away interest was entertained on this assumption.

Par is not a technical term, but one in common use. Webster defines it as "equal value—equality of nominal and actual value." "A term applied to any two things of equal value" is the definition of Zell's Cyclopaedia. "Of equal nominal and actual value" is the definition in 'New Century Book of Facts.' "All authorities agree in these definitions. The word par is also used for the value expressed in a certificate of stock or other security. That is the meaning in our code chapter on corporations and in the revenue law as to banks and other corporations.

"For a price not less than par" means a sum of money equal to the value of the bonds when sold, which included interest. Did the legislature know of the mysterious doctrine of apportionment of interest as applied to these bonds? Was it aware that a coupon is of no value until it is due as held below? That, if the bonds had been sold January 1, 1911, the coupons would have been worth the sum named in it, but a sale on December 31, 1910, carried the coupon as a bonus to the buyer of the bond because interest cannot be apportioned said the court, unsupported by any authority in the world.

Par means of equal value—equal to what? The bonds with or without coupons? Were not the coupons part of the bonds? Were they not the inducement to the purchase? Would anybody desire a bond without coupons, unless the body of it stipulated for interest? The plainness of the question involved in this case embarrasses the effort to make it plainer.

The language of the law is significant. It is not at par merely, but for a price not less than par plainly meaning their value or worth when sold which might be when several coupons had matured by their terms.

I deny the assertion of the court below that the highest bidder even below par would have been entitled to the bonds. It would have been the duty of the officers to reject all bids below par, otherwise, a sale at seventy-five cents on the dollar would have been valid. Will anybody agree to that?

If the legislature intended the bonds to go at face value with coupons as a bonus, why did it not say so? Face value means without accrued interest, while par means full value.

All testimony as to the meaning and practice of bankers and bond dealers was incompetent and should have been excluded. The legislature did not employ language with reference to their practice. It did not consult them as to the language used and such testimony is both useless and incompetent. The books define words and courts go by them and not the notions of witnesses. Besides, what one banker might think a hundred others might contradict. *Dexter v. Phillips*, 121 Mass. 178, relied on as decisive of this case, has no application to it, not even a remote bearing on it. It simply darkened counsel and confused the court. It was a totally different subject. Par and value were not mentioned in it, because it involved a wholly different subject. It was a contest between the residuary legatees of the will of Dexter, who were directed by his will to pay income to Phillips. Dexter owned bonds of various kinds and real estate rented and died when bonds and rents were not due and the only question in the case was, whether these rents and interest were income or capital, and the court, overruling a former decision of the court held on reasoning I do not comprehend, that they were not capital but income. The case would seem to be authority against the

view of the court below in this case because it considered immature interest and rent as income and that immature coupons did not go with the bonds, while in this case immature coupons were considered as nothing and go with the bonds. I do not think that *Dexter v. Phillips* was ever cited before in any case involving the question of par or value. It speaks of bonds not due, the court below of interest not due. Not one of the citations in the opinion of the court below furnished any support whatever.

The case in Sm. & M. 507 was a suit on a promissory note payable "in the notes of the chartered bonds of Mississippi at par." Held, the notes were to be taken at par. Of course. Does that throw any light on this case?

State v. Simmons, 70 Miss., presents no such question as is involved in this case. The reference to former statutes of this state for sale of bonds throws no light on the Act of 1910, which must be interpreted by its own terms. These are all independent acts, each determinable by its own provisions.

Evans v. Tillman, 38 So. Co. 238, claimed to be directly in point, utterly fails to support the conclusion drawn from it. The act interpreted by the court not only used the term "face value," but in several sections used that expression in the sense of principal without accrued interest, said the court, and besides authorized commissions for placing bonds, on which these judges held the sale should not be enjoined. Chief Justice McKiver dissented. There were but few days of interest involved and the commissioners authorized for placing the bonds were doubtless sufficient to cover the interest involved.

State National Bank v. Board of Commissioners, 46 So. Rep. 307, lends no countenance to the decision of this case below. The law gave the board power to sell the bonds with or without the coupons attached. It advertised them for sale with coupons attached. The bank bid

offering a premium and the court held the sale valid. Of course, the wonder is that there was any dispute about it.

Yesler v. Seattle, 1 Wash. 309, is inapplicable. There is nothing about par, or face value, or accrued interest. It involved the validity of a change by the municipal authorities of some of the terms of the bonds after a vote by the people in favor of a bond issue. The change was within the terms of the law. There was no selling below par or giving a bonus as in the pending case. The same court in a later case held that payment of a commission on a sale of bonds made it below par. *Hunt v. Fawcett*, 8 Wash. 390.

Commonwealth v. Lehigh Ave. Ry. Co., 129 Pa. 417, decided that a railroad corporation whose authorized capital was one million dollars, but with only one hundred thousand dollars paid up could not issue bonds beyond fifty thousand dollars, half its capital stock, because of the provision of the Constitution limiting such issues to half of the capital and that the par value of the capital stock meant capital actually paid in. A proper decision but with no bearing on this case.

Olsom v. Tanner, 117 Wis. 544, gives no support to the decision below. It merely holds that "face value" means the amount named in the certificate. Of course, it could not be made to mean anything else in that case. The case is valuable as showing the well-settled meaning of the expression face value, which emphasizes the inquiry, if the legislature intended to authorize sale of the bonds at face value instead of par, why did it not say so? The case may be claimed to inferentially support the view contended for in this argument.

Duvall Co. v. Knight, 29 So. Rep. 408, cited by the court below, held that par value means principal and interest accrued on coupons to date of delivery of the bonds, but that case is condemned by the court below because it follows the New York decisions.

The attempt to distinguish the principle of this case from that involved in *Delafield v. Illinois*, 26 Wendall 192, and *Ft. Edwards v. Fish*, 156 New York 363, is futile. That the first mentioned was decided more than fifty years ago is hardly a fatal objection to its sound reasoning, especially as it was approved and followed in 1898 by the other. The first mentioned was in chancery and is reported in 8 Paige 517, and on appeal was affirmed as reported in 26 Wendell 172. The case of *Ft. Edwards v. Fish*, 156 New York 363, contrary to the statement in the opinion of the court below, involved a sale of bonds with coupons just as in this case and interest was held to have accrued thereon. It was directly in point.

In Hogg's Appeal, 22 Pa. St. 479-489, the court said: "Par means the amount really due including interest." This was in reference to past notes of the bank bearing interest. Trustees were authorized to accept past notes at par.

It is thus seen that not a single case supports the ruling below, while many cases are directly contrary to it.

The decisions contrary to the ruling below are:

In *Delafield v. Illinois*, 8 Paige 517, and 26 Wendell 192; *Ft. Edwards v. Fisher*, 156 N. Y. 363; Hogg's Appeal, 22 Pa. St. 479, 489; *Duval Co. v. Knight*, 29 So. Rep. 408; *People v. Miller*, 82 N. Y. Sup. 621, 622, and 84 App., Division 168, par value was held to include interest to date of sale. *Hunt v. Fawcett*, 8 Wash. 306, holding that payment of commissions on sale of bonds made sale below par.

Not a case has been found to sustain the ruling below:

The reason cases deciding the question here involved are so few is because of the general understanding and acceptance of the view contended for in this argument proved by the fact that no case holds a contrary view. The cases establish the doctrine that any sale by which the issuance of bonds receives less than their full value or worth is a sale at less than par.

In *Appeal of Whelen*, 108 Pa. St. 162, 183, it was held that allowance of one per cent commissions to the purchaser of bonds was a sale below par although the law provided for commissions for selling.

Jas. R. McDowell, assistant attorney-general, for appellee.

In deciding this case, the court should bear in mind, and will bear in mind, no doubt, its effects. If there is any reasonable interpretation by which the word par would be construed to mean face value, as used by the legislature and as interpreted by the three commissioners charged with the sale of the bonds, one of whom has since the same changed his views, then, the court should give the benefit of any doubt to this construction. In other words, if the authorities are conflicting and the court might go either way, it should resolve all doubt in favor of the validity of the sale. There is no question of bad faith here as regards the sale. The point was not raised; no opposition to the sale was made. It was done by unanimous consent upon an interpretation of the law which certainly seemed reasonable and seemed to carry out the legislative purpose, and certainly was the one interpretation which could be given the law which would make it effective in selling the bonds, the thing the legislature had in mind.

The honor of the state is at stake. Already objection has been made in the New York Exchange to the list of Mississippi securities because of her refusal to pay these very interest coupons. Let not Mississippi be the only state whose credit is not good abroad, and let not Mississippians who come to the relief of their state when she needed the money be disappointed in their state. No one will contend that if the sale was clearly illegal, the state is bound by it to pay the interest; but if there is doubt, then certainly the doubt should be resolved in

favor of the validity of the sale for the protection of the good name and honor of our state.

The bulk of authority seems to be with the opinion of the learned trial judge. Counsel seeks to brush aside with a wave of his hand the decisions cited in the opinion of the court, and simply states as a matter of fact that the law is the other way. In my judgment, the trial judge decided the case correctly, and his decision should be affirmed.

Geo. Butler and F. M. West, for appellee.

We shall devote a small part of this brief to the meaning of the word "par." 29 Cyc., p. 1556, defines the word "par," thus: "Equal, q. v. Applied to commercial paper, without discount or premium. Applied to currency, equal to gold. Applied to stock, the term has been construed to mean an amount equal to the amount subscribed for the same."

We would call the court's attention to the second definition just given, viz.: "Applied to commercial paper, without discount, or premium." In the note to the text it will be found that the authority cites the case of *Smith v. Elder*, 7 S. & M. 507 (Miss.), as authority for the definition just given, and, adopts that case as authority for the definition.

It appears, therefore, that the supreme court of this state has already defined the word in accordance with the views maintained by the appellees here, which is, that "par" merely means without discount or premium.

If the word means that, then it can mean nothing more nor less than "nominal" or "face value."

This court in the recent case of *Lampton v. Edwards*, gave a commercial meaning to the coupons attached to the bonds in this controversy, and held that the same were subject to commercial law and usage; and, since such holding, the definition just given, viz., "without discount or premium" as "applied to commercial paper," is im-

portant and significant. 21 Am. & Eng. Law (2 Ed.), p. 1029, defines the word "par" thus: "Equal. The word is used to denote a state of equality or equal value. Bills of exchange, stocks, and the like, are at par when they sell for their nominal value; above par, or below par, when they sell for more or less."

The words "par value" have been defined as follows:

"The words par value of the capital stock, used in an act incorporating a railroad company and empowering a borrowing of money not exceeding in amount one half of the par value of the capital stock, were construed to mean capital stock paid up, and not authorized capital." *Com. v. Lehigh Ave. R. Co.*, 129 Pa. St. 405.

Elliott on Railroads, vol. 1, section 109, p. 178, says: "A subscription to the capital stock of a corporation amounts to an agreement to take the stock at its par value, and where a landowner agrees to take the stock of a railroad company in payment of damages to his land caused by the construction of the road, he cannot demand the stock at its market value." (See notes.)

It cannot be gainsaid that if the market value of corporate shares is one hundred and forty upon nominal shares of one hundred that the market value is above par. It is also manifest that if the market value of stock is seventy-five upon a nominal share of one hundred that such value is below par.

The same authority, section 110, p. 181, says: "The doctrine which we have been considering would seem to prevent a corporation, at least as against creditors, from issuing paid-up stock and releasing the subscriber upon payment in money of less than its par value; but where all the other stockholders consent, and it is not forbidden by the charter or statute, such a transaction is binding upon the company, and it cannot collect the difference between the amount paid and the face value of the stock for its own benefit. And in a recent case, the Supreme Court of the United States went still further and held

that an active corporation might issue stock and sell it upon the market for far less than its par value, in order to obtain money to prosecute its business, and pay its debts, and that creditors could not compel the purchaser to pay its face value." See *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed., p. 227, and notes.

It appears, therefore, that the words "par" and "par value" are synonymous.

V. J. Stricker, for appellees.

Mr. Endlich says, in his "Interpretation of Statutes," section 35, "It is an elementary rule that construction must be made of all the parts together, and not of one part only by itself. A survey of the entire statute is almost always indispensable, even where the words are the plainest, for the true meaning of every passage is that which harmonizes with the subject, and with every other passage of the act."

When this test is applied to the bond issue act in question it is hardly possible to escape the one result. For if we consider the conditions which necessitated the issuance of the bonds, and the conditions which determined their marketable character after they were issued we are driven to the opinion that the word "par," as used, was intended to refer only to the bonds themselves (not to the coupons) and only to that value which could be immediately ascertained by an examination of their face.

A comprehensive reading of the whole act, affording an interpretation logical in proportion to the effort at cognition, with a survey sufficiently extensive to include all the circumstances under which the bonds were issued, leads to the conclusion that the legislators contemplated a limit of price for which they could be sold, such limit to be, with readiness and certainty, at all times ascertainable by a mere glance at the bonds themselves.

The legislative mind is but the average of the mind of its constituency and it expresses itself ordinarily in

that language which is universally spontaneous in the simple empirical departments of the popular knowledge; and this for the reason, first, that it is but natural for them to do so, in the absence of studied efforts at abstractions and, second, they are influenced in their habits of thought by those conditions which are at all times the general measure of society in its composite feature, the ideas and sentiments of the whole, as well as of each part, finding convenient and agreeable thought conveyances in such words as are developed along with the common process, and immediately referable thereto, as indicating the feelings, intentions and experiences of the common mind.

Therefore the word "par" was used as meaning "equal," being a common vehicle of a notion to make one thing equal to another.

What thing or things, therefore, were intended for equality is the sole question with which we are to deal.

In this case the word "par" in the act is used in connection with the things, bonds. And with reference solely to bonds, which are the very text and objects of the act.

Coupons are no where included as parts thereof. They are in fact specifically excluded, and intended as mere representatives of the interests which the bonds are to bear from the date of their issuance.

("And the dates of their issuance, when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they are to run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery.") *Yesler v. City of Seattle*, 25 Pac. 1014; 1 Wash. St. Reports 308; *Gage v. McCord* (Ariz.), 51 Pac. 977-79.

Argued orally by *J. A. P. Campbell* and *C. D. Potter*, for appellant, and *George Butler* and *J. R. McDowell*, assistant attorney-general, for appellee.

SMITH, J., delivered the opinion of the court.

The validity of the bonds here under consideration is not challenged, their validity being conceded by all parties. The contention is that the bondholders are not entitled to the interest on the bonds which had accrued at the time of their purchase. Two questions are submitted to us for decision: (1) Is a district attorney authorized to institute this suit? (2) What is the meaning of the word "par," as used in the "act authorizing the issuance of the bonds for the purpose of defraying the expenses of the government of the state of Mississippi," approved April 14, 1910? Should the first question be answered in the negative, it would be our duty to reverse the judgment of the court below, and to decline to answer the second question, for the reason we would then be without jurisdiction so to do. We are not in accord as to what the answer to this question should be, and since, even should we answer it in the affirmative, our response to the second would necessarily result in a reversal of the judgment of the court below, we have determined to pretermitt any discussion of, and to express no opinion upon, the first question.

The word "par" is taken from the Latin, without change of form, and means "equal," "equality." In commercial and financial parlance, it is used to denote "a state of equality or equal value; an equality of actual with nominal value." It is universally held, so far as the research of counsel, supplemented by our own, has enabled us to ascertain, that the equal, or par, or par value of an interest-bearing bond, on the date of its issuance, is a value equal to the principal thereof; on any day subsequent to its issuance, it is a value equal to the principal plus accrued interest, or, to be more accurate, plus the then value of the accrued interest. The nominal value of such a bond necessarily increases with each passing day by the amount of the accrued interest, which, on its face, it promises to pay.

In *State of Illinois v. Delafield*, 8 Paige (N. Y.), 527; *Delafield v. State of Illinois*, 26 Wend. (N. Y.) 192, and *Id.*, 2 Hill (N. Y.) 159, it was held "that, where the legislature of a state authorized its officers to borrow moneys for the use of the state and to sell its bonds for that purpose, but not for less than their par value, a sale of bonds which were to draw interest from the time of sale, but which were to be paid for in future installments only and without interest, was a sale of such bonds for less than their par value, and that they were not binding upon the state, because its agents had exceeded their authority." When the matter was before the chancellor, he said: "If the officers could issue bonds which would draw interest immediately, and still be allowed to give the purchaser of such bonds the use of the money loaned for ten months, without interest, they could with the same propriety, so far as the statutory prohibition was concerned, have sold the bonds upon a contract that they should be delivered and draw interest immediately and that the purchaser might advance the nominal amount of the bonds in installments of from one to five years, as the same might be wanted by the complainant to carry on her public works. . . . The very idea of a sale of a bond, or draft, or other security for the payment of money, at par, is that it is to be sold dollar for dollar of the amount due and payable thereon. . . . Such is the popular or generally received meaning of the terms 'par' or 'par value,' and this was unquestionably the sense in which these terms were used by the legislature of Illinois, in the statute under which the officers of the state were authorized to issue these bonds." When the case reached the court of errors, Judge Bronson said that "if par value does not mean in this case a dollar in money for every dollar of security, the wit of man cannot tell us what it does mean." Senator Verplank, referring to the same subject, said: "If the payment be now made to the state in New York funds, the 'par' value

would, in the common language of the stock market, as well as the natural interpretation of the phrase, independent of usage, be the amount due on the face of the certificate. But the actual sale is made on terms which on the three hundred thousand dollars sale gave the appellant an advantage of one hundred and three days' interest, and on the two hundred and eighty-three thousand dollars sale of above ten months. I cannot, upon any understanding of the words, consider this a sale at par value, any more than if there had been an undisguised discount at the same rate." *Village of Ft. Edwards v. Fish*, 156 N. Y. 363, 50 N. E. 973. The only difference between that case and the one at bar is that there the bonds were sold, but not paid for until several months' interest had accrued thereon, while here several months' interest had accrued on the bonds at the time they were purchased. The principle governing the two cases must therefore be the same. In *Village of Ft. Edwards v. Fish*, *supra*, it was held that "when village water bonds draw interest from their date, and are deposited of by by the commissioners after their date, with accrued interest attached, their face or par value, within the meaning of the statute, is the sum of the principal and the accrued interest." To the same effect, see *Duvall v. Knight*, 42 Fla. 366, 29 South. 408; *Hogg's Appeal*, 22 Pa. 479, and *Bank v. Greenburgh*, 173 N. Y. 215, 65 N. E. 978.

The only other case dealing with the par value of interest-bearing bonds, which has come under our observation, is the case of *Evans v. Tillman*, 38 S. C. 238, 17 S. E. 49. This case is not in point here, for the reason that the court pretermitted any discussion of the meaning of the words "par value," as used in the financial and commercial world, and rested its decision upon a ground peculiar to the statute under consideration by it, and which has no bearing on the case at bar. In *Smith v. Elder*, 7 Smedes & M. 507, it was held that the word "par" means

“without discount or premium.” If the money received for these bonds had been less than the principal thereof, they would, of course, have been sold at a discount, or less than par. This would have been true, even if the full amount of the principal had been paid, and a part thereof afterwards returned to the purchasers. If these coupons are to be collected in full, that is just what will occur here; for in that event the state will pay to the purchasers a sum of money not earned as interest, and which could only represent a refund on the price paid for the bonds. In *Hunt v. Fawcett*, 8 Wash. 396, 36 Pac. 318, the court held that “to sell the bonds at their face value, and at the same time pay a large commission to the purchaser, is not to sell at par.” The cases of *Dexter v. Phillips*, 121 Mass. 178, 23 Am. Rep. 261; *State National Bank v. Board of Commissioners*, 121 La. 269, 46 South. 307; *Yesler v. City of Seattle*, 1 Wash. 309, 25 Pac. 1014; *Commonwealth v. Lehigh Ave. R. R. Co.*, 129 Pa. 417, 18 Atl. 414, 498, 5 L. R. A. 367 and *Newark v. Benjamin Elliott et al.*, 5 Ohio St. 113, cited and relied upon in the court below, are not in point.

But it is said that an examination of the statutes passed by the various legislatures, authorizing the issuance of bonds, discloses the fact that the words “par” and “face” value have been used in these statutes as synonymous, that consequently the legislature must have so used the word “par” in the statute now under consideration, and that the face value of an interest-bearing bond is the principal thereof, excluding interest. The rule of construction thus invoked by counsel for appellee is that in a case of doubt and uncertainty the court may, in construing a statute, look to prior statutes in order to ascertain the meaning of the words used in the statute under consideration; but this rule can never be invoked where the words used have a plain and well-settled meaning, or where to do so would not remove, but create, an ambiguity. It is true, also, that where the legislature by

means of a series of statutes running through a number of years has been engaged in building up a general scheme or system, as, for instance, a system of drainage, all of these statutes must be construed together in order to arrive at the legislative intent, and the words of the later statutes will be given the same meaning as was given to them by the legislature in the former statutes; but such is not the case here. It may be that counsel are in error in assuming that the face value of an interest bearing bond is the principal thereof, excluding interest, as to which we are not called upon to express an opinion. It is true that the term is so defined by the lexicographers, and three cases are cited in support of this definition: *Osgood v. Bringolf*, 32 Iowa 265; *Olson v. Tanner*, 117 Wis. 544, 94 N. W. 305, and *Marriner v. Roper Co.*, 112 N. C. 164, 16 S. E. 906.

In the first of these cases it does not appear whether the instrument, in that case a judgment, bore interest on its face or not; so that the decision is consequently of no value here. In the second case the instrument under consideration did not on its face bear interest, and this fact was made the ground of the court's decision. In discussing this matter the court, among other things, said (*italics ours*): "There is nothing ambiguous about the words 'face value' as applied to such a paper; therefore it would be useless to spend time discussing what they might be held to mean in the light of rules for judicial construction. Being used clearly in their plain, ordinary sense, there is no room for construction. It is considered here that the common meaning thereof in the relation under discussion is the amount named in the paper, not including interest or anything determinable by computation of evidence aliunde *especially where the right to interest does not appear upon the face of the paper*. It will be observed that the subject of interest is not even alluded to on the face of the certificates. That presents the clearest kind of a case for confining the term

'face value' to the money value expressed in the language of the paper. . . . Respondents' counsel bring to our notice with much confidence *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *Id.*, 2 Hill (N. Y.) 159; and *Meixell v. Kirkpatrick*, 29 Kan. 679. Those cases, however, do not treat of the meaning of 'face' or 'face value' as regards an instrument merely naming a sum of money, as in this case. They deal with *prima facie* value of obligations to pay money, saying, in effect, that the apparent worth thereof is the amount due upon the face of the instruments, including interest. The obligation before the court in each case, it will be noted, indicated upon its face that the principal sum drew interest. If such adjudications bear at all on the questions here for decision, they are certainly not sufficiently persuasive to cause us to hesitate to apply what appears to be the common, ordinary, and well-recognized meaning of the words under discussion, where used in an instrument containing no reference whatever to the subject of interest." In the last case, *Marriner v. Roper Co.*, the instrument under consideration by the court did not bear interest on its face, and the question of interest in fact was not involved. It was simply an order or ticket issued by a corporation to its employees, payable in merchandise.

On the contrary, the only cases dealing with the face value of an interest-bearing instrument are *State v. Delafield*, *Village of Ft. Edwards v. Fish*, and *Duvall v. Knight*, *supra*; and in the first of these it was impliedly, and in the other two expressly, held that the face value of such an instrument is the principal plus accrued interest. The promise, on the face of the bonds, is to pay a certain sum plus interest. It follows from the foregoing views that the bondholders are not entitled to the unearned interest on these bonds.

The judgment of the court below is reversed and the cause dismissed.

ON SUGGESTION OF ERROR.

The assistant attorney-general again calls our attention to the evidence in this case which he states we "seem to ignore." This testimony was not referred to in our former opinion, for the reason that there is no controversy between the counsel relative thereto, and for the further reason that most of it is wholly immaterial, having no bearing on the legal questions involved. This evidence discloses that pursuant to section 2 of chapter 99 of the acts of 1910 the bonds were offered for sale to the public by means of advertisements in the newspapers, and that no bids were received therefor; that thereupon the governor with considerable difficulty succeeded in selling the bonds at private sale to various parties and at various times, the last sale being made on the 29th day of December, 1910, all sales being made "with the advice and consent of the treasurer and auditor." The bonds were dated on and bear interest from July 1, 1910. All parties being under the mistaken impression that the "par" of an interest-bearing bond is the principal thereof, excluding accrued interest, no account was taken of this interest in the sale of the bonds; but all of them were sold for the amount of the principal thereof, which was the highest price that could be obtained for them. This evidence simply shows that the bonds were sold in good faith under the mistaken belief that the law was being complied with. The question before us, however, is not the good faith of the parties, but whether the law under which the bonds were sold was in fact complied with.

It does not appear when the contract for lithographing the bonds was made, except that it was shortly after the 6th day of June, 1910. They were not delivered by the party with whom this contract was made until the 13th day of September following. Some of the purchasers agreed to take part of the bonds prior to the

13th day of September; but they were not delivered, and the money to be paid therefor was not paid into the treasury, until after that date. These facts can have no bearing upon the right of the purchasers to collect the unearned interest. The sale of the bonds did not in fact take place until they were delivered and the money paid into the treasury.

Again, it is said that the general manager of the Merchants' Bank & Trust Company of Jackson, Mississippi, testified without contradiction that the par value of an interest-bearing bond is the principal thereof, excluding accrued interest, except where such interest is represented by a coupon which has matured, matured coupons being included in ascertaining the par value of the bond; that this was the definition of the term acted upon by the business world generally, and by his bank particularly, in all transactions involving the par value of such instruments. This evidence was really incompetent and is wholly immaterial, for the reason that the words "par" and "par value," as applied to commercial paper, have a well-settled meaning in commercial law, as shown in our original opinion, and consequently are not subjects of expert testimony.

The suggestion of error is overruled. *Overruled.*

HORRACE KNOX v. EXPORTERS' COTTON OIL COMPANY.

[56 South. 185.]

1. MASTER AND SERVANT. *Assumption of risk. Damages.*

Where a declaration alleges that defendant was master and plaintiff his servant, and that defendant owed plaintiff the duty to furnish him a safe place to work, that it was plaintiff's duty to look after a seed conveyor, a dangerous piece of machinery, which it was defendant's duty to guard; that it consisted of a spiral screw revolving near the floor, around which cotton seed was dumped to be carried by the screw to another department; that plaintiff's duty was to see that the screw was not clogged and that in doing so he had to pass along and step over the screw, and that defendant knew that the screw was dangerous and required a guard, but failed to guard it, and while plaintiff was attending to the conveyor, the seed having been dumped on the end of it, struck plaintiff's leg and knocked it against the screw injuring him, and further alleging that had defendant protected the screw, plaintiff would not have been injured, and that defendant was negligent in not guarding it, and that such negligence was the proximate cause of the injury. *Held*, that the declaration stated sufficient facts to constitute a cause of action against the defendant.

2. SAME.

Such a declaration was not demurrable on the ground that it showed that the danger from the unguarded screw was obvious and that plaintiff assumed the risk, nor because it did not allege that the seed were dumped against plaintiff by defendant or that defendant had failed in any duty in that respect.

APPEAL from the circuit court of Harrison county.

HON. T. H. BARRETT, Judge.

Suit by Horrace Knox against the Exporters' Cotton Oil Company. From a judgment sustaining a demurrer of defendant to plaintiff's declaration he appeals.

The facts are as follows:

The appellant, who was the plaintiff in the court below, filed his declaration against the appellee as defendant. The court sustained a demurrer to the declaration

and plaintiff appeals. The declaration and demurrer are as follows:

DECLARATION.

“Plaintiff, Horace Knox, complains of the Exporters’ Cotton Oil Company, defendant, a corporation organized under the laws of the state of Georgia, and doing business in the state of Mississippi, with its domicile in the city of Gulfport, Mississippi, in a plea of trespass on the case.

“For that, whereas, heretofore, to wit, on or about the 6th day of October, 1909, the said defendant corporation was engaged in the manufacture of cotton seed oil, and other cotton seed products, in the city of Gulfport, Harrison county, Mississippi, and, in the conduct of said business, the defendant owned and operated a large factory in said city; that, on the aforesaid date, plaintiff was hired by defendant by the day at the wage of one dollar and sixty cents per day and was then and there the servant of defendant, and defendant was then and there the master of plaintiff, and, as such, it was incumbent on said master, the defendant, to furnish plaintiff, the servant, with a reasonably safe place in which to work, which it failed to do, as hereinafter to be set out.

“That on said last-named date, as such servant of defendant, it was plaintiff’s duty to attend to and look after a certain part of defendant’s machinery in said plant, known as the seed conveyor, and, on said date, plaintiff was engaged in attending to and looking after said seed conveyor; that said seed conveyor is a very dangerous piece of machinery, and it was then and there the duty of defendant to have said seed conveyor sufficiently guarded, so as to make the place immediately around said seed conveyor a reasonably safe place in which to work; that, in the operation of said seed conveyor, the method by which the seed was conveyed by said conveyor was as follows: Said seed conveyor con-

sisted of a spiral shaped screw about ——— feet long, which revolved on or near the floor of defendant's said plant; piles of cotton seed would be dumped by defendant on both sides of this screw, and said seeds would be taken up in the spiral like thread on this screw as they fell on said seed conveyor, and, by revolutions of said screw, said seeds, so taken up, would be carried along said screw a distance of ——— feet to another department; that it was plaintiff's duty, as aforesaid, to attend to this seed conveyor, and to see that the seeds did not clog said screw as they were carried along said screw by the revolutions thereof, and to see that the seeds fell on the end of said screw properly, so that they would be seized by said screw, and in order to do this work plaintiff had to go backwards and forwards along said screw, and from one side of the screw to the other, as the seeds were piled on both sides of said end of the screw, where they were seized by the screw; and in order to go from one side of said screw to the other, as aforesaid, in attending to this work, plaintiff had to step over the spiral screw that seized the seeds as they fell and conveyed them, as aforesaid.

"That the defendant knew that, in order to properly perform his work, plaintiff had to do this act of stepping over said screw and going backward and forward along said screw, and that the defendant knew that said piece of machinery was dangerous and required a protecting guard in order to make it reasonably safe as a place around which to work, yet, notwithstanding, defendant failed to place any sort of guard around said screw; and on the date aforesaid plaintiff was busy attending to the screw of said seed conveyor, when the seed was dumped down on the end of said seed conveyor, where it was to be taken up by said screw, and struck the plaintiff and knocked his leg against the screw, causing the plaintiff to be greatly bruised, maimed, and crippled, and laid up for a period of two weeks; that, had the defendant

protected said revolving screw of said conveyor, as aforesaid, which was a very dangerous piece of machinery and required protecting by a guard, plaintiff would not have been injured, as aforesaid, as in that case his leg would have struck the guard, and not said screw.

“That defendant’s negligence consisted in this: That said seed conveyor was dangerous machinery, and said defendant knew, or ought to have known by reasonable diligence, that it was dangerous machinery, and it was negligence in defendant not to protect said seed conveyor with a guard, so as to prevent any one from coming in contact with said screw, and that the failure of defendant properly to guard said screw of said seed conveyor was the proximate cause of plaintiff’s injuries; that, at the time the plaintiff was injured, as aforesaid, he was working for defendant by the day, and was twenty-six years old, and was receiving one dollar and sixty cents per day for his work; that by reason of said injuries he was laid up for two weeks, under a doctor’s treatment, and thereby incurred aa large doctor’s bill; that said injuries, received, as aforesaid, through defendant’s negligence, caused plaintiff to suffer great physical and mental pain, and that he continues to suffer therefrom, and is permanently injured, to his damage in the sum of two thousand dollars.

“Wherefore he brings this suit, and demands judgment against defendant in said sum of two thousand dollars.”

DEMURRER.

“Comes the defendant, Exporters’ Cotton Oil Company, by its attorneys, and demurs to the declaration herein filed against it, and for causes of demurrer assigns the following causes and grounds of demurrer, to-wit:

“(1) The declaration does not state sufficient facts to constitute a cause of action against the defendant.

“(2) It appears from the allegations of the defendant that the supposed unguarded condition of said screw or conveyor, and the supposed danger therefrom alleged in the declaration, was as open, obvious, and apparent to plaintiff as to defendant, and that the supposed danger therefrom was one of the risks assumed by the plaintiff in accepting said employment, and that the supposed injuries therefrom were and are not injuries for which defendant is liable to plaintiff.

“(3) The supposed dangerous place to work, as alleged in the declaration, appears from the allegation thereof to have been open, obvious, and apparent to plaintiff when he accepted said employment, and at all times thereafter and at the time of receiving said supposed injuries, and dangers therefrom were risks assumed by him.

“(4) It appears from the allegations of said declaration that said supposed injuries to plaintiff were proximately caused by seed dumped down on the end of said conveyor striking the plaintiff, and knocking his leg against said conveyor, whereby it is alleged he received said injuries; but said declaration does not allege that said seed were dumped against plaintiff by defendant, or that said act was negligently done by defendant, or that defendant had failed in any duty in that respect.

“(5) Said declaration is otherwise indefinite, vague, uncertain, and insufficient, and for causes to be assigned at the hearing thereof.

“Wherefore, for want of a certain declaration in this behalf, the defendant prays judgment, and that the plaintiff may be barred from maintaining his aforesaid action in said declaration mentioned,” etc.

J. H. Mize, for appellant.

As to the point that appellant's declaration was vague, indefinite and uncertain, we think that the declaration speaks for itself, in this; it sets out the kind of machine

that injured appellant, its dangerous character, and appellant's duties in connection with the machine, and minutely describes the danger and negligence complained of. We do not see how the declaration could have been more explicit and submit that this ground of demurrer was not well taken.

On the other point, that appellant assumed the risk, we submit that the authorities all show that this was a question for the jury.

In *Spoonick v. Backus-Brooks Co.*, 17 Am. Neg. Rep. (C. S.), 166, 89 Minn. 354, a sawmill case, there was a platform on which plaintiff had to work, and under the platform was gearing not covered. A stick which plaintiff was putting in position fell from his grasp and in attempting to seize it as it fell under the platform, his hand and arm were caught and badly injured by the gearing not covered. The defendant was held liable and the court said the question of risk was for the jury and judgment for plaintiff was affirmed.

In *Bredeson v. C. A. Smith Lumber Co.*, 15 Am. (S. C.) Neg. Rep. 348, a Minnesota case decided January, 1904, Minnesota report not at hand, plaintiff was at work in a sawmill and was knocked with a board which threw his foot into an unrailed hole in the floor and as he fell back, he tried to save himself and his wrist was caught on a partly protected saw and he was injured. *Held*, that he was not guilty of contributory negligence, and did not assume the risk, and verdict in his favor was affirmed.

To the same effect is the case of *Hansen v. Seattle Lumber Co.*, 19 Am. Neg. Rep., Current Series, 592, a Washington case decided in 1906; also, *Cobb Chocolate Co. v. Knudson*, 17th Am. Neg. Rep., Current Series, 167, an Illinois case decided in 1904, where plaintiff was injured on unguarded cog wheels, and judgment for plaintiff was affirmed.

In *Berg v. United States Leather Co.*, 18 Am. Neg. Rep., Current Series, p. 678, a Wisconsin case decided June, 1905, and very much in point, the court held that plaintiff, who was shoveling coal into a conveyor between which and him was an unprotected sprocket chain, did not assume the risk of injury from his clothing being caught by a sharp nail used to fasten the end links of the chain.

To the same effect in the case of *Dells Lumber Co. v. Erickson*, 1 Am. Neg. Rep., Current Series, p. 794, U. S. Circuit Court of Appeals, May 1907. Also, *American Car & Foundry Co. v. Clark*, 17 Am. Neg. 165, 32 Ind. App. 644, where plaintiff was hurt on an unguarded wood working machine, defendant was held liable.

In *Giebell v. Collins Co.*, 17 Am. Neg. Rep., Current Series, 165, where plaintiff had his fingers cut by an edger not properly guarded, a judgment for the plaintiff was affirmed, the court holding that plaintiff did not assume the risk.

In *Walker v. Grand Forks Lumber Co.*, 12 Am. Neg. Rep., Current Series, top. p. 102, 90 N. W. 573, where plaintiff, an oiler in a sawmill, had his foot injured by unguarded machinery, the court held: "That the question of defendant's negligence in failing to fully guard certain machinery in its sawmill in which plaintiff, an employee, was injured, and of the latter's contributory negligence or assumption of risk, were for the jury to pass on and determine.

To the same effect is the case of *Anderson v. Pacific National Lumber Co.*, 111 Pac. Rep. 337. Also, ——— v. *Cudahy Packing Co.*, 111 Pac. Rep. 440.

We think, from the foregoing authorities, it is clear that appellant did not assume the risk, and that the question should have been submitted to the jury.

It is a general rule that dangerous machinery must have guards, and, in the absence of guards, the servant

does not assume the risk. Thompson on Negligence, vol. 4, sec. 4017 *et seq.*

We therefore submit that this case should be reversed and remanded.

Geo. P. Money, for appellee, filed an extended brief, contending:

1st. That the declaration does not state a cause of action.

2nd. That the danger was obvious and that plaintiff assumed the risk.

3rd. That the declaration does not show that the seed were dumped against plaintiff by defendant or if so that it was the act of a fellow-servant.

Citing the following authorities: *Meyer v. King*, 72 Miss. 1; *McMurtry v. Ry. Co.*, 67 Miss. 601; *Truly v. Lumber Co.*, 83 Miss. 430, 36 So. 4; *Simms v. Forbes*, 86 Miss. 413, 38 So. 546; *Vicksburg Mfg. Co. v. Vaughn*, 27 So. 599; *Bell v. Refine Oil Mill Co.*, 77 Miss. 387, 27 So. 382; *Railroad Co. v. Price*, 870, 72 Miss. 870; 20 Enc. Law (2 Ed.), 117 citing many authorities in note 3; 20 Ency. Law (2 Ed.), p. 124-5; 20 Ency. Law, p. 118.

WHITFIELD, C.

The declaration in this case was good against demurrer. It seems to have been carefully drawn with that end in view. The defenses which are set up by the demurrer may or may not be sustained when the case is developed on its facts. But we think the court clearly erred in sustaining the demurrer and dismissing the suit.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein set out the judgment is reversed, the demurrer overruled, and the cause is remanded.

G. W. LONG v. EAVES & COMPANY.

[56 South. 178.]

SPECULATIVE CONTRACTS. *Reformation.*

A contract for the sale of two hundred bales of cotton to be delivered two months hence at a certain price is not speculative in the sense that such contracts are condemned by law and a court of equity is not warranted in refusing to reform such a contract for fraud and enforcing it as reformed.

APPEAL from the chancery court of Lee county.

HPN. J. Q. ROBBINS, Chancellor.

Suit by G. W. Long against Eaves & Co. From a decree dismissing the bill, plaintiff appeals.

The facts are as follows:

Appellant entered into the following contract with appellees: "Tupelo, Miss., Nov. 2, 1907. Mr. G. W. Long, Tupelo, Miss.—Dear Sir: We beg to confirm sale to you to-day of two hundred bales of cotton (200 B|C) for January delivery in Tupelo, Miss., at (10½) ten and one-half cents per pound, basis Middling with one-eighth cent differences above and below. Yours very truly. [Signed] Eaves & Co., G. W. Long.

Eaves & Co. is a partnership composed of J. H. Eaves and S. B. Hinds, and is engaged in the purchase and sale of spot cotton. Appellant is not a cotton man, nor is he familiar with the terms of the trade. The trade between appellant and appellees was concluded by Hinds, with full information obtained from Eaves, who dictated the contract, which was in due time executed by Hinds and Long. Appellant inquired of Hinds if this contract called for delivery of middling cotton and was advised that it did, and relied upon the representations of Hinds in regard to the entire transaction. Appellees did not

deliver middling cotton, but tendered some cotton which was below middling, which was refused by appellant.

Appellant thereafter filed a bill in chancery, setting up the facts and alleging fraud on the part of appellees, and seeking a recovery of one thousand, two hundred dollars, being the profit which he could have made out of a resale of the cotton, had middling cotton been delivered by appellees at the price stipulated in the agreement. The chancellor found that the appellees had perpetrated fraud, but dismissed appellant's bill for the reason set out in his opinion, which is as follows:

"I have given this case repeated consideration. I have frequently read and reread this evidence. From this evidence, I believe this contract most unconscionable. I believe the evidence shows that the defendants "put up a job," in the language of the street, on the complainant. The evidence shows that one of the defendants purposely and intentionally, so as to make it a one-sided contract—"heads I win, tails you lose."

"The evidence shows that the other defendant knew of this; knew that his partner had prepared the loaded dice, and still insisted on playing the game with this loaded dice. He induced Mr. Long, his friend, to sign this one-sided contract, when he knew that Long did not understand the effect of the contract, and when he knew that Long was relying upon and trusting him. I think that under the circumstances Long had the right to inquire of Mr. Hinds about the effect of the contract, and had the right to rely upon his statement. But Long's confidence was misplaced; this friend did not act square with him, but, on the contrary, deceived him as to the effect of the contract.

"If this contract had been made, as complainant understood it, he would have made about one thousand, two hundred dollars. As it turns out, he makes nothing. If the contract is interpreted as it is written, he should get nothing.

"If the market had gone against complainant and this were an effort to force him to comply with the contract, I would not hesitate under this evidence to declare the contract fraudulent, and that it could not be enforced.

"On the other hand, the complainant has lost nothing but some profit he would have made, if the contract had been written as he understood the deal. He seeks to reform and enforce the contract in accordance with what he conceives to have been the true contract, and with what the evidence in fact shows that he understood. The deal, although relating to spot cotton, was really and in fact a speculative venture. The contract was so drawn that it mattered little to defendants whether the market went up or down; they would not lose. But as it turned out the complainant failed to make some profits that he should have made.

"Does that present a case for equitable relief? I think the evidence shows the transaction a pure speculation, and his loss is purely speculative, and not real. Courts of equity will not uphold, nor sustain, nor approve such an unconscionable contract as this is shown to be, and would grant relief to prevent its enforcement. But it does not follow that equity should reform and enforce this contract for the benefit of him who was imposed on and deceived into making the contract, and grant him damages for the profits he would have made. If it be a speculative venture, pure and simple, equity will simply leave the parties where they are without relief.

"I confess that I do not like for such a transparent fraud as this contract was to pass through my court, without a more substantial condemnation than mere words; but I feel so sure of the correctness of the position that equity should and will not enforce purely speculative ventures that I must not allow my antipathy to fraud to lead me into a violation of other sound and well-established principles of equity.

"The bill will be dismissed."

C. P. Long, for appellant.

No written contract is beyond the reach of a court of equity for the purpose of reforming it, if the prayer for relief is timely presented. *Palmer v. Hartford Ins. Co.*, 54 Conn. 488.

In the present case, it is not contended that there was any mutual mistake between the parties, but that there was a mistake on the part of the appellant caused by the fraud and misrepresentations of the appellees and the willful, palpable fraud and misrepresentations on their part. The court has found such to be the case, and that the instrument or contract was not written on account of this fraud and misrepresentations according to the contract of the parties. Where this state of affairs exists, it is not necessary to prove a mutual mistake, but the party guilty of the fraud and misrepresentation, where the testimony shows what the true contract was, is estopped to take advantage of his own wrongs.

In other words, so far as the oral requirements are concerned, there was an agreement or meeting of minds, and each party understood the contract exactly alike, but the fraud was in the preparation of the written contract by appellees. Under the agreement it was the duty of appellees to prepare the written contract exactly as they and appellant had traded.

"If one whose duty it is to prepare a written contract, according to a previous agreement, by changing its terms and delivering it as in accordance with such agreement, prepares one materially different from the agreement, he commits a fraud which entitles the deceived party to a reformation." — v. *Freeman*, 99 Ga. 376; *McDonald v. Youngbluth*, 46 Fed. Rep. 836; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; *Bergen v. Ebey*, 88 Ill. 269.

"If stipulations are kept out of a contract by fraud, the contract may be reformed in equity and specifically enforced." *Cubberly v. Cubberly*, 39 N. J. Eq. 514.

"Equity may reform a deed for fraud, notwithstanding the plaintiff's negligence." *Hitchens v. Pettingill*, 58 N. H. 3.

"A court of equity may reform a bill of sale of a vessel to allow its registry and enrollment under the laws of the United States." *Sprague v. Thurber*, 17 R. I. 454.

"An ordinary contract for the sale of merchandise may be reformed where the negligence of the defendant in signing the contract was not so gross as to bar him of the right of reformation on the ground of fraud and mistake." *Sutton v. Risser*, 104 Ia. 631.

"If there has been mistakes or fraud in the giving of a note, it may be reformed, in equity, according to the general principles above mentioned, to conform to the actual agreement between the parties." *Miller v. McCarty*, 47 Minn. 321; 28 Am. St. Rep. 375; *Kropp v. Kropp*, 97 Wis. 137; *Lee v. Percival*, 85 Ia. 639; *Loudermilk v. Loudermilk*, 98 Ga. 780.

"Equity will relieve against a mistake, either of law or of fact, where it is produced by misleading statements or misrepresentations of the other party to the contract." *Lott v. Kaiser*, 61 Tex. 665; *Bales v. Hunt*, 77 Ind. 355-360; *Snell v. Ins. Co.*, 98 U. S. 85.

"A mistake of law as to a contract, caused by fraud, imposition, or misrepresentation, may be relieved against in equity." *Kyle v. Bebley*, 81 Wis. 67; *Bush v. Merri-man*, 87 Mich. 260.

"If one party to a contract is mistaken, either as to law or fact, and the other, with knowledge, contracts with him, equity will relieve upon the ground of fraud." *State v. Paup*, 13 Ark. 129; *Weaver v. Van Aiken*, 71 Mich. 77.

"The latter having such knowledge, and remaining silent when he should speak, is estopped to defeat a reformation by asserting a want of mutuality in the mistake." *Roszell v. Roszell*, 109 Ind. 354.

“An omission or error in a contract, caused by fraud or mistake, will be reformed.” *Smith v. Burk*, 14 Cal. 75; *Parker v. Schaller Bank*, 98 Ia. 246.

The chancellor says: “Complainant lost nothing but a profit. He would have made, had the contract been written as was agreed upon, about twelve hundred dollars.” He certainly lost this, and it was a thing he was entitled to. If he had bought a piece of land for the purpose of re-selling it, and paid nothing down on it, or any other kind of property in the same way, all he would have been out would be the profit that he could sell it for more than he agreed to pay for it. I know of no rule that requires possession to be given, or money to be paid, before the contract can be reformed. The fact is, if either one of these things had occurred, there would have been no use for a written contract whatever. If this is the law a scoundrel can make any kind of agreement that he feels like, promise anything, agree to anything, write the contract to suit himself, inveigle the other party into signing it, and if the thing turns out to the disadvantage of the honest man, in ninety-nine times out of a hundred, he will perform the contract, but if to the disadvantage of the scoundrel, he will not and cannot be made to do so. It would seem to me that the promise of the innocent party to perform the contract, his reliance thereon, his intention to do so, and the probability that he would do so if he looses, instead of the party who had perpetrated the fraud on him, is a sufficient consideration, even if one was needed in order to reform the contract.

It is the boast of equity, that it rises to furnish relief in cases where rights exist, where the law furnishes no remedy, and if there is no remedy for appellant in chancery in this case, the opportune time is here for a moulding process. The time has not arrived when scoundrels and thugs can pursue their calling, with no care except to stay on the right side of the prison lines.

Mitchell & Clayton, for appellee.

Since the chancellor has found that the contract was purely speculative, does the record present such a case as will warrant a court of equity to award damages thereunder?

We think that the above propositions enter into the proper solution of the cause, and shall discuss them in the order set out above. While we recognize the effect of the finding of a chancellor of the facts in a case, to-wit, that it has the same force as the verdict of a jury when heard on appeal, yet the further fact that it is not unknown to this court that where such is the case, yet the court can, in a proper case, find otherwise, gives us ground to question the soundness of such finding. Even counsel, having assailed such findings, gives us other reasons for doing so. This court cannot know, whether or not, appellees would have made the contract, as appellant understood it. Appellees contend that it expressed their understanding thereof. Courts cannot make contracts for parties. Instruments can only be reformed, where they do not express the actual intentions of the parties. *Wise v. Brooks*, 69 Miss. 895; *Kerr v. Kuykendall*, 44 Miss. 139; *Dunbar v. Newman*, 46 Miss. 237; *Bisphams Principles of Equity* (7 Ed.), sec. 646; 34 Cyc. p. 905, pt. of note "A." In the late case of *Butterfield Lumber Co. v. Guy*, 92 Miss. 376, 377, this court, speaking through Justice Mayes, says: "There is no law restricting the right of all persons to make contracts to suit themselves, when the contract violates no principle of law. The safety of commercial transactions depend upon this. Should courts undertake, because of improvidence, to set aside contracts which are lawful, they would invade personal rights and disturb and destroy the safety of business transactions. Where parties have made contracts in language leaving on doubt as to the intention then there is no ground for the interference

by the courts, but the contracts must be enforced as written."

In 65 Am. Reports, on page 482, under the authorities collated under note "Reformation of Contracts" at the bottom of page 282, it is said "that the proposition which lies at the foundation of all suits to reform is, that the court cannot make such a contract as it thinks the parties ought to have made, or would have made if better informed, but merely makes as the parties intended it should be."

At page 485 of the same authority, second paragraph thereon, it is said "while courts of chancery will, upon proper proof of fraud, accident or mistake, or surprise, raise an equity by which an agreement of the parties will be rectified, it will not interfere where the instrument is such as the parties themselves designed it to be. If they voluntarily choose to express themselves in the language of a written contract, they must be bound by it, for there is no general rule better settled, or more just in itself, than, that parties who enter into contracts, and especially contracts in writing, must be governed by them as made, according to the true intent and meaning, and must submit to the legal consequences arising from them."

In the case of *Miles v. Miles*, 84 Miss. 637, the court speaking through Judge Truly uses this significant language: "An ancient and unquestionable jurisdiction of a court of equity is to grant a relief on account of a mistake of facts in written contracts whether executed or executory, if the writing expresses something of substance variant from what the parties actually intended."

This can mean only one thing, that is, it is the very back bone of this equitable power, that the parties must have intended to execute the contract as re-formed, but the court can grant the relief prayed for.

SMITH, J., delivered the opinion of the court.

It is manifest from the evidence that the contract, as written, did not express the agreement of the parties,

and that its failure so to do was caused by the fraudulent conduct of appellees. This, we understand, was the view taken of it by the chancellor in the court below; but he erred in holding that it constituted such a "speculative venture" as to warrant a court of equity in declining to grant the relief prayed for. The contract simply provides for a sale of personal property, delivery to be made at a future date. It is speculative only in the sense that all such contracts are speculative, and not in the sense that such contracts are condemned by the law.

The decree of the court below will be reversed, and decree here reforming the contract in accordance with the prayer of the bill, and awarding appellee damages in the amount prayed for.

ANDERSON, J., took no part in the consideration of this case.

WILL CORLEY v. STATE.

[56 South. 179.]

CRIMINAL LAW. *Rape. Force. Instructions.*

On the trial of a defendant charged with an assault with intent to rape it was reversible error for the court to give to the state the following instruction:

"The court charges the jury that in an assault with intent to commit rape, the force used may be only constructive; and the imposition of one hand upon the person of the female, though without intent to hurt, is in legal contemplation, the use of force, from which a criminal intent is presumed. Now if the jury believe from the evidence beyond a reasonable doubt that Will Corley imposed his hand on the person of Rebecca McDaniel, being a female of previous chaste character against her will, with intent to ravish her, and if the jury so believes beyond a reasonable doubt, then it is your duty to find the defendant guilty."

99 Miss.]

Brief for appellant.

APPEAL from the circuit court of Smith county.

HON. W. H. HUGHES, Judge.

Will Corley was convicted of assault with intent to rape and appeals.

The facts are sufficiently stated in the opinion of the court.

J. J. Stubbs and W. T. Simmons, for appellant.

The third instruction for the state is vicious, and a reversible error. It tells the jury that the jury is authorized to presume the intent of the defendant, the very essence of the crime alleged, equivalent to saying that the jury is authorized to presume the guilt of the defendant, simply by the proof that the defendant imposed his hand upon the prosecutrix and that too, without intent to hurt, which from the very nature of things, could not be the law. This instruction also has the same vice, as the first instruction for the state, containing the following words: "Being a female of previous chaste character, against her will," which in plain and unmistakable language tells the jury that the prosecutrix is of previous chaste character, and that the defendant laid his hand on her against her will, hence, it assumes as true disputed facts of vital importance, in effect tells the jury that this necessary element of the crime alleged and which the state must prove, to the exclusion of every reasonable doubt, before a conviction is warranted, are true, that is to say, that the woman was of previous chaste character and the defendant imposed his hand upon her against her will, which assumption of the court, in this instruction, in all probability, worked a conviction in this case, and the defendant is entitled to reversal for such flagrant errors. Since our associate counsel, Mr. M. U. Mounger, has fully discussed this instruction, citing the authorities, we deem it unnecessary to say anything further concerning this vicious instruction.

M. U. Mounger, for appellant.

In the first place, I wish to call the attention of the court to a few of the errors in the instructions. Take instruction number three for the state. In this instruction, the court will note that the trial court told the jury: "In an assault with intent to commit rape, the force used may be only constructive; and the imposition of one hand upon the person of the female, though without intention to hurt is in legal contemplation, the use of force from which criminal intent is presumed. Here the jury are told that it is not necessary to prove the specific intent by facts and circumstances or by some direct evidence but the law will presume it from the fact of his having laid his hand on her. Of course it does not say this in these words but it means just this and nothing else and could not possibly mean anything else but just this. The attorneys for the prosecution were enabled by this instruction to argue to the jury, "You need not trouble yourselves about what defendant thought in his heart or really intended in his heart, the law relieves you of that trouble." You do not have to consider circumstances and evidence on this point, the law settles it all. "The imposition of one hand on the person of the female, though without intention to hurt is in legal contemplation the use of force from which a criminal intent is presumed." It is not, mind the court, "a criminal intent may be presumed," but it is "a criminal intent is presumed." It is not, may it please court, "the female in this case" but the "female," meaning that, not only in this case but in every case of this kind, the law relieves the jury of the trouble of deciding whether or not a man had in his heart criminal intent in a case where it is shown that he laid his hand on a female, even though it was without intent to hurt. It would seem that when the court gave this instruction that the court had in mind the idea that it could never be possible

for a man to lay his hand on the person of a woman without the criminal intent to rape her.

Defendant was not being tried for assault but assault with intent to forcibly ravish. See Statute Code 1906, sec. 1359. The specific intent is as much an ingredient of the offense as the assault. There can be no assault with intent to commit rape without the specific intent to ravish. See Am. & Eng. Ency. 1; (2 Ed.), Volt. 23, p. 865; *Head v. State*, 43 Neb. 30, N. W. 494; *Jones v. State*, 90 Ala. 24 Am. St. Rep., 850. Where it is decided that on a trial for an assault with intent to rape the evidence to be sufficient to convict must show such acts and conducts of the accused as leave no reasonable doubt of his intention to gratify his lustful desire against the consent of the female notwithstanding resistance on her part. May it please the court to examine the facts of this Alabama case as the facts were somewhat similar to the facts in the case at bar and the court held the facts in that case not sufficient to warrant a conviction. See cases cited at foot of page 852 of Am. St. Rep. Volt. 24, and among them *Green v. State*, 67 Miss. 356. See 2 Bishop on Criminal Law, 656. In assault with intent to rape even the assault must contain all the elements of a common assault. See 23 Am. & Eng. Enc. Law 864. Yet this instruction tells the jury that intention not to hurt would avail the defendant nothing. But the instruction goes on and assumes that Rebecca McDaniels is a woman of previous chaste character. It does not even leave that to the jury but settles that for them too. If there ever was a legal curiosity in the way of an instruction this is one. As to assuming disputed facts, See McWillie & Thompson, Digest, sec. 5649, and cases cited there.

Car Fox, Assistant Attorney-General, for appellee.

Several errors are argued in the briefs for appellant, none of which would be material, I think, if the evidence were strong against the appellant, except that the third

instruction granted for the state is erroneous. The jury were required to find intent to rape as a matter of fact, before they could convict under that instruction, and if a fault of this kind in an instruction could be cured, it would seem that the instruction for the defendant had that effect.

It is argued that there is no evidence to sustain a conviction. The prosecutrix had a number of witnesses who had known her all her life, and who testified that her reputation was good. There is a very sharp conflict about this. If she was a woman of good character, then the appellant was guilty of a most aggravated assault and battery, to say the least, upon her, for which there ought to be a very severe punishment.

I can find no answer, however, to the contention that there was no evidence upon which to base a verdict of intent to rape.

WHITFIELD, C.

The third instruction given for the state in this case is as follows: "The court charges the jury that, in an assault with intent to commit rape, the force used may be only constructive; and the imposition of one hand upon the person of the female, though without intent to hurt, is, in legal contemplation, the use of force, from which a criminal intent is presumed. Now, if the jury believe from the evidence beyond a reasonable doubt that Will Corley imposed his hand on the person of Rebecca McDaniel, being a female of previous chaste character, against her will, with the intent to forcibly ravish her, and if the jury so believes beyond a reasonable doubt, then it is your duty to find the defendant guilty." It is palpably erroneous; but the serious trouble in this case, lying at its very threshold, is that there is not a particle of evidence in the case warranting a verdict of

intent to rape. The testimony of the prosecutrix herself is utterly insufficient on this point.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is reversed and the cause remanded.

INDEX.

ACTIONS.

1. *Negligence. Proof. Variance. Personal injury. Damages. Code 1906, section 1985.*

In an action for damages for personal injuries where the declaration charges gross negligence and intentional wrong, the plaintiff may recover actual damages where only negligence is shown as the allegation of gross negligence includes negligence, the greater including the less. *Hollingshed v. J. & M. V. R. R. Co.*, 464.

2. *Want of ordinary care. Actual damages. Physical and mental suffering.*

In an action for personal injury where the evidence shows that the injury complained of was the result of a want of ordinary care alone on the part of defendant, the plaintiff should recover not only for medical bills and loss of time, but also for physical pain, and mental suffering as the result thereof, as these are all elements of actual damages. *Ib.*

AGENT.

See PRINCIPAL AND AGENT.

ALIENS.

1. *Right to inherit land. Common law.*

The common law, unmodified by statute or treaty, excluded an alien from inheriting lands from a citizen. An alien had no inheritable blood through which title could be transmitted. *Mortgage Co. v. Butler*, 56.

2. *Code 1906, section 2768. Voidable title.*

Code 1906, § 2768, does not render absolutely void title acquired and held by a non-resident alien in violation of its terms but as at common law only voidable at the instance of the state. *Ib.*

APPEALS.

ALIENS—Continued.

3. *Adverse possession.*

Code 1906, § 2768 (Code 1892, § 2439), provides that a non-resident alien may have or take a lien on land to secure a debt and at any sale thereof to enforce payment of the debt may purchase the same and thereafter hold it not longer than twenty years, and during that time may sell the same in fee to a citizen and that all lands held or acquired contrary to such section shall escheat to the state, but a title to real estate in the name of a citizen of the United States, or a person who has declared his intention of becoming a citizen, whether resident or non-resident, if he be a *bona fide* purchaser, shall not be forfeited by reason of alienage of any former owner or other person. *Mortgage Co. v. Butler*, 56.

Section 3092, Code 1906 (Code 1892, § 2732), provides that when a mortgage after condition broken obtains actual possession or receives the profits of the mortgaged land the mortgagor or any person claiming through him may not sue to redeem after ten years from the time at which the mortgagee obtains such possession or receipt, etc. *Held* that a non-resident alien mortgagee obtaining possession through tenants, though under an invalid sale, and holding such possession and receiving the rents and profits more than ten years adversely under claim of title, secured a perfect title as against the mortgagors. *Ib.*

APPEALS.

1. *Failure to give bond in time. Dismissed Code 1906, section 34.*

Under Code 1906, § 34, appeals from decrees overruling demurrers "must be applied for and bond given within ten days after the demurrer is overruled, if in term time." *Turner v. Simmons*, 28.

2. *Same.*

This statute is both mandatory and jurisdictional and must be strictly complied with, and the court is without power to graft any exceptions on the statute. *Ib.*

3. *Same.*

Where the statute is not complied with the supreme court is without jurisdiction of the cause and the same will be dismissed either on motion of appellee or by the court of its own motion. *Ib.*

4. *Supreme court. Motion for new trial. Trial.*

The general rule is that alleged errors of the trial court, occurring during the trial, will not be revised on appeal, unless such errors

APPEALS.

APPEALS—Continued.

have been called to the attention of the trial court in a motion for a new trial. *Hayes v. Liquor Co.*, 583.

5. *Same.*

Error in giving a peremptory instruction is analogous to a demurrer to the evidence and is reviewable on appeal, although no motion for a new trial was made in the trial court. *Ib.*

6. *Justice of the peace. Certificate of justice of peace. Contradiction of certificate.*

Where a municipality filed a petition for appeal from a justice court and the justice certified at the bottom of such petition that the same had been filed and appeal granted as of a certain date, the justice will not be permitted to impeach his own certificate. *Town of Purvis v. S. E. Rees*, 636.

7. *Criminal law. Certification of record. Code 1906, sections 84 and 85. Supreme court jurisdiction.*

Under Code 1906, sections 84 and 85, on appeal to the circuit court the copy of the record of proceedings before a police justice must be certified to by the police justice and not the city clerk. *Rodgers v. City of Hattiesburg*, 639.

8. *Circuit court. Supreme court. Want of jurisdiction.*

Where on appeal from a police justice court to the circuit court the record of proceedings before the police justice was not certified to by the police justice, the circuit court was without jurisdiction of the appeal, and on a further appeal to the supreme court that court was without jurisdiction of such appeal. *Ib.*

9. *Same.*

The want of such a certified copy is not a defect which can be waived or cured. It is jurisdictional and the question may be raised for the first time in the supreme court. *Ib.*

10. *Same.*

The proper order in the supreme court in such case is to reverse and remand the case with direction to the circuit court to dismiss the appeal to that court and award a writ of *procedendo* to the court of the police justice to enforce the judgment of his court unless the appellant shall perfect the record of proceeding from such police court. *Ib.*

ARSON—ATTACHMENT.

APPEALS—Continued.

11. *Criminal law. Hearing in supreme court. Rules of court.*

Rule 23 of the supreme court provides that "the docket of criminal cases for the whole state shall be taken up on the second Monday after the Monday fixed by law for calling the docket for each district. Under this rule where a case was not on the docket for trial when the final call of the criminal docket for the session ended, it cannot be placed there, but will be continued until the court returns to the criminal docket for another trial of same. *Bennett v. State*, 644.

12. *Same.*

This rule is not in violation of section 72, Code 1906, which provides that "the return day in the supreme court for all criminal cases no matter from what court or county or district appealed, is the Monday of any term first after the expiration of twenty days from the date of taking the appeal" the court having the right to make rules for the efficient, orderly and systematic conduct of the business of the court. *Id.*

ARSON.

Criminal law. Sufficiency of evidence.

Where on a trial for arson the burning of the house was abundantly shown, but the only evidence that the burning was caused by a criminal agency was an alleged confession by accused and several slight circumstances tending to establish such criminal agency, but wholly insufficient for that purpose, a conviction will be reversed. *Ratcliff v. State*, 277.

ATTACHMENT.

1. *Foreign judgment. Certification. Evidence. Code 1906, section 171. Construction of statute.*

A judgment recovered in another state cannot be proved or admitted in the courts of this state as evidence of the fact, until there has been a compliance with section 905 of the Revised Statutes of the United States. *McLin & Co. v. Worden*, 547.

2. *Section 171, Code 1906. Attachment.*

Under section 171, Code 1906, a defendant is entitled to have his damages assessed for the wrongful suing out of a writ of attach-

BANKS.

ATTACHMENT—Continued..

ment, if the question of indebtedness be decided in his favor, although the grounds upon which the attachment was sued out were not contested by him and is not compelled to bring a new and independent suit on the bond. *Ib.*

BANKS.

1. *Limitation of actions. Demand deposits. Waiver. Concealment of cause of action. Code 1906, sections 3097 and 3099. Estoppel.*

A depositor in a bank cannot sue the bank for his funds so deposited until payment has been demanded and refused and such demand and refusal is necessary to set the statute of limitations in motion. *Benefit Association v. Bank*, 610.

2. *Same.*

The demand of the depositor, however, may be waived by the bank. This may be done by the bank notifying the depositor that his claim will not be paid; and rendering him a statement of his account, showing the balance claimed by the bank to be due him is equivalent to notice that any claim for a sum in excess of that amount will not be paid and as to such excess the statute would begin to run from the time of the rendition of such statement. *Ib.*

3. *Code 1906, section 3109. Fraudulent concealment.*

Where a bank believing a forged endorsement to be genuine, paid a check to a person other than the drawer and delivered the cancelled check to the drawer as a voucher, Code 1906, section 3109, providing that "the fraudulent concealment of a right of action will postpone the running of the statute of limitations," has no application, as there was no fraud or concealment on the part of the bank, and the statute of limitations commenced running from the time the bank rendered the drawer a statement of its account showing the check charged against it. *Ib.*

4. *Same.*

In such a case, the six years' statute of limitations applies as provided by Code 1906, section 3097, and not the three years statute of limitation as provided by section 3099 of Code 1906, as the pass book, cancelled check and certificate of deposit are written evidence of the debt. *Ib.*

5. *Estoppel in pais. Payment of forged paper.*

Where a bank pays a check drawn by a depositor to the wrong person, the endorsement having been forged and afterwards renders an

BILLS OF EXCHANGE—BONDS.

BANKS—Continued.

account to the depositor in which the payment of such check is shown and the depositor receives the same without objection, he is not estopped from suing the bank, as estoppel *in pais* only operates in favor of one who, induced by the acts or representations of another, so changes his position that injury would result if the truth were known. *Benefit Association v. Bank*, 610.

6. *Same.*

Where the depositor neither by act nor representation, induced the bank to pay out money on a forged indorsement, the depositor is entitled to assume that his check, payable to order, will not be paid by the bank until it shall have assured itself that the necessary indorsement appearing thereon is genuine. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Action on condition precedent. Tender. Waiver.*

Where a note is given payable, without condition, on a fixed date in part payment of a right to sell a patent when obtained by the payee, and a contract is entered into at the same time between the parties to the note, which contract does not make the securing of the patent a condition precedent to the liability on the note, the payee of the note may sue on the note when due, before the patent is secured. *Byers v. McDonald*, 42.

2. *Same. Waiver. Tender.*

Where in such case the maker of the note has notified the payee that he would not accept a transfer of the right to sell the patent, no tender of such transfer was necessary before suing on the note. *Ib.*

3. *Same.*

Where it is clear that a tender will not be accepted, it need not be made. *Ib.*

BOARD OF SUPERVISORS.

See SUPERVISORS.

BONDS.

1. *Drainage district. Petition to establish. Sufficiency. Bonds. Interest. Code 1906, sections 1684, 1703, 1706, 1709. Acts 1906, chapter 132.*

Under Code 1906, section 1684, and acts 1906, chapter 132, section 3, requiring that a petition to create a drainage district, "should set

BOOKS OF ACCOUNT—BURDEN OF PROOF.

BONDS—Continued.

forth or show the names of the owner of the several tracts of land mentioned therein to be embraced in the district." A petition which in one paragraph describes the land to be embraced within the district and in the next paragraph recites that the land embraced in the proposed district belonged to the following named persons with the postoffice address of each following his name and then recites a list of all landowners with their postoffice address, without stating what particular land was owned by each, was a sufficient compliance with the statute. *Haley v. Drainage Commissioners*, 556.

2. *Interest. Code 1906, sections 1703, 1706, 1709. Acts 1906.*

Sections 1703 and 1706 of Code 1906 and the corresponding sections of acts 1906 authorize the payment of interest on drainage bonds, and section 1709 of Code 1906 and the corresponding sections of acts 1906 provides both for the payment of this interest annually and for the collection of the money necessary so to do by assessment made by the board of supervisors. *Ib.*

3. *State bonds. Interest. Sale. Par value.*

Under acts of 1910, chapter 99, authorizing the sale of interest bearing state bonds at not less than "par," the "par value" of such bond on the date of its issuance, is a value equal to the principal thereof; on any day subsequent to its issuance it is a value equal to the principal plus accrued interest. *Smith v. State*, 859.

BOOKS OF ACCOUNT.

Secondary evidence. Witness.

In a suit upon a verified itemized account where the only question involved was one of overcharge and the items themselves as shown on the copy of the account sued on were not denied in the counter affidavit, it is still true that the question of overcharge involved the books of account and the books themselves are the best evidence and it was reversible error to allow a witness to use the itemized account to refresh his memory and testify that it was a copy of the books when it was not shown that the books themselves were correct. *Hoye v. Lumber Co.*, 229.

BURDEN OF PROOF.

Never shifts.

The burden of proof never shifts from the state in a criminal case. *Hampton v. State*, 176.

 BY-LAWS—CARRIERS.

BY-LAWS.

See INSURANCE.

CARRIERS.

1. *Telegraphs and telephones. Regulations. Charges. Statutory law. Code 1900, sections 4826, 4899, 4842, 4843, 4844, 4839, 4841, 4845, 4883. Laws 1908, chapter 119, p. 124.*

By Code 1906, §§ 4826, 4899, a railroad commission is created for the supervision of common carriers, defining its purpose, and providing remedies for its violation, of which section 4843 includes telegraph and telephone companies as common carriers, as declared by Constitution 1890, § 195. Section 4842 gives the commission power to fix and supervise rates, section 4839 prohibits discrimination in rates, unless authorized by the commission, section 4844 forbids rebates or reductions from fixed charges, and sections 4839, 4841, 4845 and 4883, provide remedies for violations of the act. Annotated Code 1892, sections 4437, 4442, relating to combinations in restraint of trade and agreements fixing the transportation of commodities, was extended in 1900 (Laws 1900, ch. 88), section 2 of which became Code 1906, § 5002, and was re-enacted by Laws of 1908, chapter 119. Section 1, subsection K as amended by subsection N and O defines trusts and combines, and provides procedure and remedies for violations of the act. The defendant company was charged, in a bill filed on relation of the attorney-general, with being a trust, with discriminations in its rates, and with attempting to monopolize the business of independent companies; the prayer of the bill being for an injunction and ouster, and for penalties. *Held* that the specific statutes relating to railroad commissions conferred jurisdiction upon it as to the whole matter of regulating telephone rates and provided ample remedies for violation of law to the exclusion of the general antitrust laws. *Telephone Co. v. State*, 1.

2. *Passengers. Master and servant. Evidence.*

Where deceased in company with another got upon the platform of a passenger train of appellant about ten o'clock at night, intending to ride a distance of about a mile, the fare being five cents and the conductor did not see these two parties on the platform, nor did they offer to pay fare, though the companion of deceased testified that they were ready and willing to pay same and expected to do so when the conductor should ask them. Whether under these circumstances decedent was a passenger was a question for the jury. *Railroad Co. v. Sanderson*, 148.

CARRIERS.

CARRIERS—Continued.

3. *Same. Master and servant. Conductors.*

The general rule that a master is not responsible for acts done by the servant outside the line of his duty and not in the service of the master, has no application to a case where a railroad passenger conductor, the *alter ego* of the company, himself inflicts the injury on the passenger. *Ib.*

4. *Inconsistent verdict. Exonerating one defendant and holding another. Code 1906, section 4944.*

An action against a railroad company and its conductor for the wrongful killing of a passenger by the conductor is both joint and several and although both are equally liable, the liability is based on distinct and different legal principles, the servant because of his personal trespass and the company because of its failure to discharge its nondelegable duty towards the public in not having a competent conductor. *Ib.*

5. *Same.*

In such case a verdict for plaintiff against the railroad company and against the plaintiff in favor of the conductor, though apparently inconsistent, presents no ground for reversal of the judgment against the company, especially in view of Code 1906, section 4944, providing that one of several appellants will not be entitled to a judgment of reversal because of error in the judgment against another not affecting his rights. *Ib.*

6. *Personal injuries. Carrying passengers beyond station. Liability.*

In the absence of some good reason, it is the duty of common carriers to allow passengers to get off at the proper depot and a failure to do so entitles the passenger to recover at least nominal damages. *Railroad Co. v. Lambert*, 310.

7. *Same.*

If in any case it is necessary for a passenger train to be pulled away beyond the depot and into its yards, it is the duty of the company to notify passengers of its purpose to return them to their proper landing place and if it fails to do so, it is negligence, and any damages occasioned any passenger as the direct result makes the company liable therefor. *Ib.*

8. *Personal injuries. Proximate cause.*

A passenger was carried by her station for about three hundred yards, where the train stopped in the railroad yard, without any notice of

CARRYING CONCEALED WEAPONS.

CARRIERS—Continued.

the purpose to return to the station, and the passenger voluntarily alighted a few minutes thereafter without any request to be carried back to the station and walked back to the station through the rain, where she waited four hours for a train which she was to take on another road and by getting wet in walking back to the depot caught a severe cold. The train which carried her by the depot backed into the station, in about twenty or thirty minutes after the passenger had alighted, for the purpose of allowing passengers to alight. *Held*, that the running of the train beyond the station was not the proximate cause of any injury and that the passenger was only entitled to recover nominal damages. *Railroad Co. v. Lambert*, 310.

9. *Local freight trains. Passengers. Gross negligence.*

A regular local freight train, equipped with the ordinary appliances and conveniences of a local freight train, except that the car attached to it for the use of passengers was what is known as a "way car" with compartments for passengers, baggage, trainmen and tools used in connection with the operation of a local freight train, is neither a regular passenger train, nor a "mixed or accommodation train" within Code 1906, section 4054, limiting the liability of carriers for injuries to passengers. *White v. I. C. R. R. Co.*, 651.

10. *Passengers. Common law duty.*

At common law there is only one class of trains in the operation of which the carrier is relieved from the exercise of the utmost degree of care for the safety of passengers on such trains and that is those trains which are not intended for and do not carry passengers. *Ib.*

11. *Same.*

In case of injury to persons riding on such trains, the carrier is not liable unless such injury is caused by its willful or intentional wrong or gross negligence as persons riding on such trains contrary to the rules of the carrier are trespassers and even when riding by permission of the trainmen in charge of such trains are bare licensees. *Ib.*

CARRYING CONCEALED WEAPONS.

1. *Pistol. Instructions.*

In a prosecution for carrying a concealed weapon, it was not error for the court to grant an instruction for the state, "that if the defendant carried concealed in whole, or in part, a pistol which was defective, in that it did not have a mainspring or a hammer, the

CHANCELLORS—CHANCERY COURT.

CARRYING CONCEALED WEAPONS—Continued.

jury should find the defendant guilty as charged. *Mitchell v. State*, 579.

2. *Same.*

An object once a pistol does not cease to be one by becoming temporarily inefficient. *Id.*

3. *Burden of proof. Instructions. Code 1906, section 1105.*

Any one indicted for carrying concealed a deadly weapon, under section 1105, Code 1906, can show as a defense, among other things, "that he was traveling and was not a tramp," but the same section provides: "And the burden of proving either of said defenses shall be on accused." An instruction which shifts this burden from the defendant to the state is erroneous. *City of Collins v. Fife*, 648.

CHANCELLORS.

Decrees. Amendment. Vacation. Code 1906, §§ 506, 507 and 1016.

Under Code 1906, § 506, so providing, "A chancellor may deliver opinions and sign decrees in vacation, in cases taken under advisement in term time, and by consent of the parties may try cases and sign decrees therein in vacation, which decrees shall be recorded on the minute book and have the same effect as if made and recorded in term time, being appealable as in other cases." *Held*, that under the terms of this statute, all decrees authorized by it to be entered are final decrees and are to be given the same effect as if rendered during a term of court and after the adjournment of the court are beyond the power of the chancellor to recall or modify, except for fraud or in accordance with section 1916, permitting the amendment of a decree where it may be safely done from the record to correct a mistake, miscalculation or misrecital of any sum, quantity or name. *Anderson v. McInnis*, 823.

CHANCERY COURT.

1. *Equity. Bill. Multifariousness. Husband and wife. Partners. General demurrer. Code 1906, section 2517.*

Where a bill in chancery by the widow against the executor of her deceased husband charged that at the time of her marriage, her deceased husband was the manager of her plantation and that the plantation business and all other business conducted by her husband was a partnership business in which she equally shared and

CIRCUIT COURT.

CHANCERY COURT—Continued.

that all of the earnings of her husband comprising his entire estate were partnership property and owned jointly by her husband and herself in accordance with a partnership agreement between them, made after their marriage, that her husband made a will which she renounced. The prayer of the bill was for an accounting of all the business transactions had by the husband during the period of their married life, embracing numerous business enterprises in which her husband ventured in his own name and various partnerships and corporations in which her husband was interested, and that certificates of stock in such corporations held in the name of decedent, be declared partnership property and that an accounting be made of all expenditures and improvements and that the rights of the parties be fixed. *Held* that the bill was not multifarious. *Jones et al. v. Jones*, 600.

2. *Code 1906, section 2517. Disabilities of coverture. Partnership.*

Since under Code of 1906, section 2517, all of the disabilities of coverture have been removed, a married woman may lawfully enter into a partnership with her husband. *Ib.*

3. *General demurrer. Equity pleading.*

Grounds of demurrer which do not go to the whole bill cannot be considered on the hearing of a general demurrer to the bill. *Ib.*

4. *Decree pro confesso. Vacating.*

Where the setting aside of a decree *pro confesso* would work no serious injury to plaintiff, but would simply deprive him of the advantage which he had secured by reason of defendant's neglect to file his answer, a motion to set aside the decree *pro confesso* should be sustained by the court. *Field v. Junkin*, 834.

CIRCUIT COURT.

1. *Criminal Law. Appeal. Certification of record. Code 1906, sections 84 and 85. Supreme court jurisdiction.*

Under Code 1906, sections 84 and 85, on appeal to the circuit court the copy of the record of proceedings before a police justice must be certified to by the police justice and not the city clerk. *Rodgers v. City of Hattiesburg*, 639.

2. *Supreme court. Want of jurisdiction.*

Where on appeal from a police justice court to the circuit court the record of proceedings before the police justice was not certified to

CLAIMS—CODE 1906.

CIRCUIT COURT—Continued.

by the police justice, the circuit court was without jurisdiction of the appeal, and on a further appeal to the supreme court that court was without jurisdiction of such appeal. *Ib.*

CLAIMS.

1. *Estate of decedents. Executors and administrators. Notice to creditors. Sufficiency. Code 1906, sections 2103 and 2107.*

Section 2107, Code 1906, providing, that all claims against the estate of decedents shall be filed within one year after publication of notice to creditors or the same shall be barred, was intended to expedite the settlement of estates by providing a short statute of limitations. *Marshall v. John Deere Plow Co.*, 284.

2. *Same.*

Section 2103, Code 1906, provides the method of putting the period of limitation, provided for in section 2107, into operation, and it can be put into operation in no other. This notice among other things must advise "all persons having claims against the estate to have the same probated and registered by the clerk of the court, granting letters, within one year, and that a failure to probate and register for one year will bar the claim." *Ib.*

3. *Against estate of decedent. Proof. Code 1906, section 2106.*

Under Code 1906, section 2106, requiring any person desiring to probate his claim against the estate of a decedent to present to the clerk a statement of his claim in writing signed by the creditor and to make affidavit to be attached thereto; a statement of the claim of the creditor with an affidavit of the creditor signed by the creditor attached thereto is sufficient, the purpose of the statute being to identify it and verify its correctness. *Bankston v. Coopwood*, 511.

4. *Same.*

A substantial and not a literal compliance with the statute is all that is required. *Ib.*

CODE 1906.

1. § 34. Time for appeal. Failure to give bond in time. Dismissal. *Turner v. Simmons*, 28.
2. § 72. Return day in the Supreme Court. *Bennett v. State*, 644.

CODE 1906.

CODE 1906—Continued.

3. §§ 84, 85. Criminal law. Appeal. Certification of record. *Rodgers v. City of Hattiesburg*, 639.
4. § 171. Foreign judgment. Certification. Evidence. Attachment. *McLin & Co. v. Worden*, 547.
5. §§ 506, 507, 1016. Chancellors. Decree. Amendment. Vacation. *Anderson v. McInnis*, 823.
6. § 729. Declaration. Essentials. *Coopwood v. McCandless*, 364.
7. §§ 901, 2766, 4631. Corporations. Deeds. Seals. Ejectment. Legal title. *Littelle v. Lumber Co.*, 241.
8. § 1016. Criminal law. Correction of judgment. *Wilson v. Town of Handsboro*, 252.
9. § 1026. Criminal law. Accomplice. Completion of offense. *Osborne v. State*, 410.
10. § 1105. Carrying concealed weapons. Burden of proof. Instructions. *City of Collins v. Fife*, 648.
11. § 1136. Instructions. Invading province of the jury. *Hampton v. State*, 176.
12. § 1177. Public records. Forgery. Cancellation of deed of trust. Indictment. *Roythress v. State*, 805.
13. § 1361. Criminal law. Robbery. Putting in fear. *Webb v. State*, 545.
14. § 1372. Seduction. Evidence. Corroboration. *Carter v. State*, 206.
15. § 1377. Criminal law. Threatening letter. Demurrer. *State v. Jamison*, 248.
16. §§ 1673, 3148. Husband and wife. Divorce and alimony. *Lis pendens*. *Gallaspy's Sons Co. v. Massey*, 208.
17. §§ 1684, 1703, 1706, 1709. Drainage district. Petition to establish. Sufficiency. Bonds. Interest. *Haley v. Drainage Commissioners*, 556.
18. § 1702. Criminal law. Plea of *autrefois acquit*. Intoxicating liquors. *King v. State*, 23.
19. § 1721. Drains. Property assessable. Board of supervisors. *Supervisors v. Drainage District*, 739.
20. § 1985. Prima facie negligence. *Hollingshed v. Y. & M. V. R. R. Co.*, 464.
21. §§ 2057, 2058. Executors and administrators. Powers and duties. *Alexander v. Herring*, 427.
22. §§ 2093, 2019. Executors and administrators. Letters revoked. Right to apply. *Railroad v. Jeffries*, 534.
23. §§ 2103, 2107. Estate of decedents. Executors and administrators. Claims. Notice to creditors. Sufficiency. *Marshall v. John Deere Plow Co.*, 284.
24. § 2106. Claims against estate of decedent. Proof. *Bankston v. Coopwood*, 511.

CODE 1906.

CODE 1906—Continued.

25. § 2182, par. V. Justice of the peace. Fees. *Connerly v. Lincoln County*, 731.
26. § 2235. Board of supervisors. Stock law. *Board of Supervisors v. Ashley*, 788.
27. § 2517. Equity. Bill. Multifariousness. Husband and wife. Partners. General demurrer. *Jones et al. v. Jones*, 600.
28. § 2575. Insurance. Limitation of liability. Regulation. Police power. *Assurance Co. v. Walker*, 404.
29. § 2592. Fire insurance. Valued policy law. *Insurance Co. v. Nunn*, 493.
30. § 2600. Contracts. Illegality. Parties *pari delicto*. Contracts against public policy. *Rideout v. Mars*, 199.
31. § 2723. Justice of the peace. Jurisdiction. Amount in controversy. *Railroad v. Hitt & Rutherford*, 679.
32. § 2768. Voidable title. *Mortgage Co. v. Butler*, 56.
33. § 3042. Wages of overseers. Lien on agricultural products. *Langford v. Leggitt*, 266.
34. §§ 3097, 3099. Limitation of actions. Demand deposits. Waiver. Concealment of cause of action. *Benefit Association v. Bank*, 610.
35. § 3108. Deed of trust. Substituted trustee. Appointment. Attorney in fact. *Mortgage Co. v. Butler*, 56.
36. § 3109. Fraudulent concealment. *Benefit Association v. Bank*, 610.
37. § 3115. Warranty deed. New promise. Consideration. Statute of limitations. *Wade v. Barlow*, 33.
38. § 4054. Limiting liability of carriers for injuries to passengers. *White v. I. C. R. Co.*, 651.
39. § 4312. Taxation Overvaluation. Right to relief. *Board of Supervisors v. Railroad*, 845.
40. § 4530. School districts. Creation. *Mebane v. Hickory Flat*, 592.
41. § 4775. Parol evidence. Statute of frauds. Insufficient description. *Cole v. Cole*, 335.
42. §§ 4826, 4899, 4842, 4843, 4844, 4839, 4941, 4845, 4983. Telegraphs and telephones. Regulations. Charges. Statutory law. Common carrier. *Telephone Co. v. State*, 1.
43. § 4885. Telegraphs and telephones. Statutes. Construction. Remedies. *Telephone Co. v. State*, 1.
44. § 4944. Inconsistent verdict. Exonerating one defendant and holding another. *Railroad Co. v. Sanderson*, 148.
45. § 5007. Telegraphs and telephones. Charges. Statutory provisions. Remedies. *Telephone Co. v. State*, 1.

COLLECTION OF NOTE—CONSTITUTION OF 1890.

COLLECTION OF NOTE.

See PRINCIPAL AND AGENT.

COMMON CARRIERS.

See CARRIERS.

CONFIDENTIAL RELATION.

1. *Deeds. Fraud. Cancellation. Consideration.*

Where illiterate parents believing that they were only executing a deed of trust on their lands to raise money to pay off a lien thereon, conveyed their lands to a son, the only consideration being that the son assumed the incumbrance which was much less than the value of the land, and immediately on discovering the fraud which had been perpetrated upon them took steps to cancel their deed, they were entitled to relief. *Webb v. Webb*, 234.

2. *Deeds.*

In such case on account of the confidential relations between the parties the court should scrutinize the transaction, more closely than if the transaction had been between strangers. *Ib.*

CONSIDERATION.

1. *Deeds. Fraud. Confidential relation. Cancellation.*

Where illiterate parents believing that they were only executing a deed of trust on their lands to raise money to pay off a lien thereon, conveyed their lands to a son, the only consideration being that the son assumed the incumbrance which was much less than the value of the land, and immediately on discovering the fraud which had been perpetrated upon them took steps to cancel their deed, they were entitled to relief. *Webb v. Webb*, 234.

CONSTITUTION OF 1890.

- § 17. Eminent domain. Damages. Estoppel. *Robinson v. City of Vicksburg*, 439.
- § 26. Trial. Excluding the public. *Carter v. State*, 435.
- § 26. Voluntary absence of accused. *Corbin v. State*, 486.
- § 90. Water courses. Local laws. *Haley v. Drainage Commissioners*, 556.
- Art. 6. Jury. Judicial power vested in Supreme Court. *N. & S. R. R. Co. v. Crauford*, 697.
- § 170. Drains: Property assessable. Board of supervisors. *Supervisors v. Drainage District*, 739.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW.

1. *Trial. Excluding the public. Constitution, section 26.*

The discretion vested in the court by the Constitution, section 26, to exclude the public from a criminal trial is in the interest of the public morals, and whether it is exercised or not is a matter in which the defendant has no concern. *Carter v. State*, 435.

2. *Eminent domain. Damages. Estoppel. Constitution 1890, section 17.*

The owner of property is not estopped to claim damages resulting in the change of grade of a street, because he signed a petition to the mayor and board of aldermen asking that the street be paved. *Robinson v. City of Vicksburg*, 439.

3. *Same.*

Constitution 1890, section 17, provides "that property shall not be taken or damaged for public use, except on due compensation being first made to the owner thereof," and this constitutional right is not waived by the owner signing a petition for the paving of a street where there is no express waiver in the petition of the right to claim damages. *Ib.*

4. *Voluntary absence of accused. Constitution, section 26.*

In a trial for a misdemeanor the accused, may, by his own fault or misconduct, waive the right to be present, but where the accused is physically unable to attend his trial, it cannot be said that he voluntarily absents himself, and if tried in his absence, he is deprived of his constitutional right to be present. *Corbin v. State*, 486.

5. *Constitution 1890, section 90. Acts 1906, chapter 132. Code 1906, sections 1682 and 1727. Local laws.*

Constitution 1890, section 90, prohibiting local laws in regard to watercourses, has no reference to artificial watercourses and does not invalidate acts 1906, chapter 132, Code 1906, sections 1682 and 1772, because counties are exempted from the provisions of the act, as it is immaterial whether these statutes are local or general. *Haley v. Drainage Commissioners*, 556.

6. *Jury. Acts 1910, chapter 135. Presumptions. Constitution 1890, article 6.*

A statute cannot confer judicial power upon a jury, as to do so would be violative of article 6 of the Constitution of 1890, under which all judicial power in the state is vested in the supreme court, and the circuit and chancery courts and the courts of justices of the

 CONSTRUCTION OF STATUTES.

CONSTITUTIONAL LAW—Continued.

peace and such other inferior courts as the legislature may from time to time establish. *N. & S. R. R. Co. v. Crawford*, 697.

7. *Duty of court.*

All doubts are resolved in favor of the constitutionality of a statute; if there is any reasonable doubt of its constitutionality, it must be upheld by the court. *Ib.*

8. *Parties who can question.*

The court will not listen to an objection made to the constitutionality of a statute by a party whose rights are not affected thereby, and who has no interest in establishing its invalidity. *Ib.*

9. *Equal protection. Classification.*

Acts of 1910, chapter 135, providing that in actions for personal injuries, contributory negligence shall not bar a recovery, but that damages shall be diminished in proportion to the amount of contributory negligence, violates neither the due process nor the equal protection clauses of the Constitution of the United States. It is within the police power of the state; it makes a classification of all actions for personal injuries and this classification is based on reason and justice and is not a discrimination in favor of defendants in other character of actions. *Ib.*

10. *Statutes. Validity.*

Where a part of a drainage act is unconstitutional, but the invalid portion of the statute is clearly separable from the balance, and there is left a consistent drainage scheme, the balance of the act is not affected thereby. *Supervisors v. Drainage District*, 739.

 CONSTRUCTION OF STATUTES.

1. *Implied repeal.*

Laws are presumed to be passed with deliberation and with full knowledge of all existing laws on the same subject, and it is but reasonable to conclude that in passing a statute, it was not intended to interfere with or abrogate any former law relating to the same matter, unless this latter act is either repugnant to the earlier one, or fully embraces the subject-matter thereof, or unless the reason of the earlier law is beyond peradventure removed. *Telephone Co. v. State*, 1.

CONSTRUCTION OF STATUTES.

CONSTRUCTION OF STATUTES—Continued.

2. *Telegraphs and telephones. Remedies.*

- Code 1906, § 4885, in the chapter on supervision of common carriers originally enacted in 1884, before the enactment of the anti-trust laws, provides that the remedies given by this chapter shall be cumulative to those existing by law. *Held*, that in view of Code 1906, §§ 4841, 4883, relating to procedure against common carriers, and the penalties for violation of the anti-trust law provided by Code 1906, § 5004, the section permits no election of remedies for injuries due to a discrimination in telephone rates, but the remedy is limited to that provided by the act for the supervision of common carriers. *Ib.*

3. *Telegraphs and telephones. Charges. Statutory provisions. Remedy for discriminating charges.*

Code 1906, § 5007, being part of chapter 145, relating to trusts and combines, and providing that, in a suit by any person injured by a trust or combine, proof that such person has been compelled to pay more for services rendered by a public service corporation by reason of such combine than he would have been compelled to pay but for such agreement or combine, shall be conclusive evidence of damage and of unlawful purpose, does not indicate an intention of the legislature that the anti-trust laws should apply to discriminations in rates made by a telephone company, defined to be a "common carrier" by the laws for the supervision of common carriers. *Ib.*

4. *Foreign judgment. Certification. Evidence. Attachment. Code 1906, section 171.*

A judgment recovered in another state cannot be proved or admitted in the courts of this state as evidence of the fact, until there has been a compliance with section 905 of the Revised Statutes of the United States. *McLin & Co. v. Worden*, 547.

5. *Section 171, Code 1906. Attachment.*

Under section 171, Code 1906, a defendant is entitled to have his damages assessed for the wrongful suing out of a writ of attachment, if the question of indebtedness be decided in his favor, although the grounds upon which the attachment was sued out were not contested by him and is not compelled to bring a new and independent suit on the bond. *Ib.*

6. *Supreme court.*

Where a statute has been re-enacted after being construed by the supreme court, such construction will be adhered to by that court. *Ib.*

CONTEMPT PROCEEDINGS.

CONSTRUCTION OF STATUTES—Continued.

7. *Statute. Re-enactment. Construction.*

Where a statute has been construed by the highest authority of a state and afterwards re-enacted in substantially the same terms, the legislature by such re-enactment adopts, along with the statute, such construction. *White v. I. C. R. R. Co.*, 651.

8. *State bonds. Interest. Sale. Par value. Statutes.*

Under acts of 1910, chapter 99, authorizing the sale of interest bearing state bonds at not less than "par," the "par value" of such bond on the date of its issuance, is a value equal to the principal thereof; on any day subsequent to its issuance it is a value equal to the principal plus accrued interest. *Smith v. State*, 859.

9. *Statutes. Prior statutes.*

The rule of construction that in case of doubt and uncertainty the court may in construing a statute, look to prior statutes in order to ascertain the meaning of the words used in the statute under consideration, can never be invoked where the words used have a plain and well settled meaning or where to do so would not remove, but create an ambiguity. *Ib.*

10. *Same.*

Where the legislature by means of a series of statutes running through a number of years has been engaged in building up a general scheme or system, all of these statutes must be construed together in order to arrive at the legislative intent, and the words of the later statute will be given the same meaning as was given to them by the legislature in the former statutes. *Ib.*

CONTEMPT PROCEEDINGS.

Evidence. Sufficiency.

In a contempt proceeding for interfering with a decree awarding the custody of a minor child to his father and depriving the defendants of his custody, evidence that defendant gave the minor bread to eat, shelter under their roof and refused to take him back to his father's house, coupled with the fact that defendants did not entice the boy away from his father and made no effort to detain him at their home is not sufficient to warrant defendant's conviction for contempt. *Magee v. State*, 83.

CONTINUANCE—CONTRACTS.

CONTINUANCE.

1. *Criminal law. Trial. Right of accused to be present.*

On reviewing the denial of an application for continuance by the lower court, the supreme court can only consider what is in the record. *Corbin v. State*, 486.

2. *Illness of accused.*

Where accused, on trial for the unlawful sale of intoxicating liquors applied for a continuance and showed that she was physically unable to attend the trial without permanent injury to her health and that she was the only material witness to contradict the testimony of the prosecution showing a sale by her, it was error for the court to refuse to grant a continuance until the next term of court or until a later day in the term when accused could be present. *Ib.*

3. *Criminal law. Illness of accused. Trial in absence.*

It was reversible error to try accused for a misdemeanor in her absence when she was unable to be present at the trial on account of sickness, a continuance should have been granted. *Haggett v. State*, 844.

CONTRACTS.

1. *Illegality. Parties pari delicto. Code 1900, section 2600.*

The general rule is that where parties are *in pari delicto* the court will lend its aid to neither, but there is a well defined exception to this which is that where the paramount public interest demands it, the court will intervene in favor of one as against the other. *Rideout v. Mars*, 199.

2. *Code 1906, section 2600. Against public policy.*

Code of 1906, section 2600 providing, "no life insurance agent shall make any contract of insurance or agreement other than such as are expressed in the application and policy, nor shall any agent pay or allow as an inducement to insurance any rebate of premiums payable on the policy," etc. An agreement by an insurance agent to induce insurance that the insured should have all the first premium, except three hundred dollars, the amount of the company's share of the premiums, was illegal as contrary to public policy and without consideration. *Ib.*

CONTRACTS.

CONTRACTS—Continued.

3. *Same.*

In such case although the parties were in *pari delicto* the agent's administrator could recover the balance of the premium from the insured. *Rideout v. Mars*, 199.

4. *Impairing obligation.*

Taxes are not due by virtue of any contract and the repeal of a statute imposing a privilege tax is not violative of the constitutional inhibition against impairing the obligation of contracts. *Crow v. Cartledge*, 281.

5. *Parol evidence. Identification.*

While pre-nuptial contracts are to be construed liberally in favor of the wife, this should not be so extended as to overturn the statute of frauds. *Cole v. Cole*, 335.

6. *Parol evidence.*

The rule is that if the description contained in the writing points to specific property, parol evidence is admissible to identify it because that is certain which is capable of being made certain. *Ib.*

7. *Same. Statute of frauds. Insufficient description.*

Under Code 1906, section 4775, requiring a contract in consideration of marriage or to sell lands to be in writing, a contract in consideration of marriage to convey either one of four tracts of land worth twenty-five hundred dollars each and owned by the husband without other description is void for uncertainty in description. *Ib.*

8. *Stipulations. Waiver.*

Where in a contract for the sale of lumber to a buyer employed in exporting lumber, there was a provision that "shipments to the buyer should be made as steamer room for desired ports becomes available." *Held*, that this provision was for the benefit of the buyer and could be waived by him, and where so waived the seller was not excused from delivering the lumber by showing that the buyer had not advised him that steamer room had been obtained. *Foerster & Co. v. Lumber Co.*, 762.

9. *Timber contract. Construction of same.*

Where plaintiff contracted with defendant to purchase all merchantable timber on a certain tract of land and to pay for the stumpage at the rate of one dollar and twenty-five cents per M, payments to be made on June 5, 1903, and quarterly thereafter, for

 CONVEYANCE—CORPORATIONS.

CONTRACTS—Continued.

timber previously cut and to remove all the timber by January 1, 1908, and plaintiff deposited with defendant thirty-two hundred dollars to pay for the last timber to be cut. *Held*, that the contract between the parties gave plaintiff's the right to cut all the merchantable timber for a period of five years, plaintiff to pay one dollar and twenty-five cents per M. feet for all timber actually cut in that time, payments to be made as provided in the contract and the the right thus granted terminated on January 1, 1908. That the thirty-two hundred dollars paid to defendant at the date of the contract did not become absolutely the money of defendant, whether the plaintiff cut the timber or not, but was left with defendant as a mere advance payment or security for timber which plaintiff expected to cut and pay for at the rate of one dollar and twenty-five cents per M feet and which if plaintiff did not cut would be returned to plaintiff. *Davis v. Billows*, 838.

10. *Speculative contracts. Reformation.*

A contract for the sale of two hundred bales of cotton to be delivered two months hence at a certain price is not speculative in the sense that such contracts are condemned by law and a court of equity is not warranted in refusing to reform such a contract for fraud and enforcing it as reformed. *Long v. Eaves & Co.*, 886.

CONVEYANCE.

Sale in bulk. Presumption. Evidence. Laws 1908, chapter 100.

The first section of Laws 1908, chapter 100, declares "that a sale of any portion of a stock of merchandise, other than in the ordinary course of trade, or in regular and usual prosecution of the seller's business, and a sale of the entire stock of merchandise in gross shall be presumed to be fraudulent and void as to creditors of the seller unless . . ." A sale in violation of this paragraph is not conclusively presumed to be fraudulent and void as to the creditors of the seller, but the presumption of fraud can only be rebutted by the purchaser at such sale by his showing a compliance with subsections a, b and c of said act. *Dry Goods Co. v. Rowe & Carithers*, 30.

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 CORPORATIONS.
Deeds. Seals. Ejectment. Legal title. Code 1906, sections 901, 2766, 4631.

Under Code 1906, section 901, section 2766 and 4631 authorizing corporations to adopt a seal and to convey land under the corporate

COVENANTS OF WARRANTY.

CORPORATIONS—Continued.

seal and abolishing the distinction between sealed and unsealed instruments made by private persons, a deed to land by a corporation made in this state, not under its corporate seal does not convey the legal title and cannot be availed of in an action of ejectment where the plaintiff must have the legal title. *Littelle v. Lumber Co.*, 241.

COVENANTS OF WARRANTY.

1. *Deeds. Breach. Damages. Subrogation.*

The limit of a warrantor's liability for breach of warranty is the amount of the purchase price with interest, but the warrantor can only be made to pay the warrantee the actual amount paid out by him to protect his title. *Allen v. Miller*, 75.

2. *Duty of warrantee.*

While the warrantee is not put to the useless expense of a fruitless litigation against an incumbrance or paramount title that must eventually prevail, yet he assumes the risk of judging correctly as to the title or incumbrance which he buys in, and must establish, as a condition precedent to his recovery either at law or equity, that it was a paramount title or lien covered by his warranty and that he acted under a necessity to save the estate. *Ib.*

3. *Breach. Defenses.*

That a warrantee of a title based on a mortgage foreclosure sale, on the foreclosure being held invalid, took a quit claim deed from the mortgagor, did not relieve the warrantor from liability for breach of covenant, though the quitclaim deed was without consideration and was taken with intent to prejudice the rights of the warrantor. *Ib.*

4. *Actions. Defenses.*

T executed a trust deed to a mortgage company to secure a loan, and on default the land was sold by a substituted trustee and bid in by the company, which thereafter sold it, and M acquired it by mesne conveyances, and conveyed to A with covenants of warranty; he taking possession. Thereafter T sued to cancel the conveyance to the mortgage company and all subsequent conveyances, on the ground that the appointment of the substituted trustee, by whom the land was sold, was not filed for record; and all subsequent grantees were made parties, and the decree canceled all of the conveyances, and ordered T to pay the debt to the mortgage company, and, on his failure to do so, that the land be sold to pay the debts. A there-

CRIMINAL LAW AND PROCEDURE.

COVENANTS OF WARRANTY—Continued.

after secured a quit claim deed from T to the land, without notice to M, and thereafter sued M for breach of covenant of warranty to recover the money paid to T. The mortgage company meanwhile assigned its claim as fixed by the decree to M who sued to enjoin A's suit, and seeks to set it off against A's claim for breach of warranty. *Held* that, to avoid a circuitry of action, M could set off his claim under the decree, which was for an amount as large or larger than A's claim, against the latter's claim for breach of covenant of warranty. *Ib.*

5. *Breach. Remedy. Declaration. Essentials. Purchase of outstanding title. Liability of grantor.*

While in order to sustain the technical action of covenant for a breach of general warranty, there must be either an actual eviction by judicial process, or a surrender of possession to a valid, subsisting, paramount, legal title, asserted against the covenantee, or that there must be a holding of the grantee out of possession by such title, so that he could not enter, yet there are two other remedies that the covenantee may invoke without waiting for eviction or surrender of the premises. These other two actions are assumpsit, or suit in chancery. *Coopwood v. McCandless*, 364.

6. *Declaration. Essentials. Code 1906, section 729.*

Under Code 1906, section 729, requiring a declaration to contain a statement of the facts constituting the cause of action in ordinary and concise language, a declaration is sufficient, if it states a good cause of action, no matter what may be its form or the name given it by the party filing it. *Ib.*

7. *Purchase of outstanding title. Liability of grantor.*

In every case where the covenantee purchases an outstanding paramount title, or pays an incumbrance, he assumes the risk of judging correctly as to the character and validity of the incumbrance or title which he buys. He must establish as a condition precedent to recovery, either at law or in equity, that it was a paramount lien or title against which the warrantor was bound to defend him; and that he acted under a necessity to save the estate. *Ib.*

 CRIMINAL LAW AND PROCEDURE.

CRIMINAL LAW AND PROCEDURE—Continued.

1. Plea of *autrefois acquit*. Intoxicating liquors. Code, 1906, § 1702. *King v. State*, 23.
2. Impartial jury. Conduct of judge. Presumptions. *Collins v. State*, 47.
3. Remarks of district attorney. Improper evidence. *Collins v. State*, 52.
4. Carrying concealed deadly weapons. Threats. *Page v. State*, 72.
5. Infant. Intent. Evidence. Burden of proof. Previous threats. *Miles v. State*, 165.
6. Credibility of witnesses. Evidence. Instructions. *Pederre v. State*, 171.
7. Indictment. Ownership of property. Embezzlement. Evidence. Variance. *Hampton v. State*, 176.
8. Seduction. Evidence. Corroboration. Code 1906, § 1372. *Carter v. State*, 206.
9. Witnesses. Impeachment. Contradictory statements. Instructions. *Gables v. State*, 217.
10. Appeal to race prejudice. District attorney. *Hardaway v. State*, 223.
11. Circumstantial evidence. Instructions. *Miller v. State*, 226.
12. Acts constituting an assault. *Grimes v. State*, 232.
13. Code 1906, § 1377. Threatening letter. Demurrer. *State v. Jamison*, 248.
14. Correction of judgment. Code 1906, § 1016. *Wilson v. Town of Handsboro*, 252.
15. Judge. Improper remarks. *Myers v. State*, 263.
16. New trial. Cumulative evidence. Corroborative evidence. *Williams v. State*, 274.
17. Arson. Sufficiency of evidence. *Ratcliff v. State*, 277.
18. Homicide. Dying declarations. Admissibility. Conduct of judge. Coercion of jury. *Wiltcher v. State*, 374.
19. Conspirators. Evidence. Credibility of witnesses. Completion of offence. Code 1906, § 1026. *Osborn v. State*, 410.
20. Proceeding before grand jury. Presence of stenographer. *Carter v. State*, 435.
21. Circumstantial evidence. Instructions. *Permenter v. State*, 453.
22. Application for continuance. Trial. Right of accused to be present. Constitution, section 26. Illness of accused. *Corbin v. State*, 486.
23. Robbery. Putting in fear. Code 1906, § 1361. *Webb v. State*, 545.

DAMAGES.

CRIMINAL LAW AND PROCEDURE—Continued.

24. Appeal. Certification of record. Code 1906, §§ 84 and 85. Supreme court jurisdiction. *Rodgers v. City of Hattiesburg*, 639.
25. Appeal. Hearing in supreme court. Rules of court. *Bennett v. State*, 644.
26. Hearsay evidence. Admissions by third persons. *Brown v. State*, 719.
27. Instructions. Weight of evidence. *Wofford v. State*, 759.
28. Hearsay evidence. False pretenses. Instructions. *Buford v. State*, 770.
29. False pretenses. Indictment. Requisites. *State v. Hubanks*, 775.
30. Murder. Instructions. Improper evidence. *Tabor v. State*, 830.
31. Continuance. Illness of accused. Trial in absence. *Haggett v. State*, 844.
32. Rape. Force. Instructions. *Corley v. State*, 896.

DAMAGES.

1. *Breach of warranty.*

The measure of damages for a breach of warranty is the money which the vendee has been and will be forced to expend for the protection of his possession and the perfection of his title and such other damages as may have been covered by the breach of warranty and not necessarily the whole purchase price. *Wade v. Barlow*, 33.

2. *Deeds. Covenants of warranty. Breach. Subrogation.*

The limit of a warrantor's liability for breach of warranty is the amount of the purchase price with interest, but the warrantor can only be made to pay the warrantee the actual amount paid out by him to protect his title. *Allen v. Miller*, 75.

3. *Construction of railroad. Independent contractor. Abutting owner. Pleading.*

Where a railroad is constructed by an independent contractor according to plans and specifications furnished by the chief engineer of the railroad, and injury results not from negligence in the doing of the work by the independent contractor, but from the doing of the work at all, as illegal or as constituting, when done, a nuisance, the railroad company is liable for damages. *Railroad v. Holden*, 124.

DAMAGES.

DAMAGES—Continued.

4. *Same. Amount.*

Where the suit by the abutting property owner was for five thousand dollars damages for injuries to his property by the construction of the railroad, and there was evidence that the property before such construction was worth twenty-five hundred dollars and that the property was greatly damaged in respect to ingress and egress to and from the property and by reason of cinders, smoke and vibrations, a verdict for three hundred dollars is not excessive. *Railroad v. Holden*, 124.

5. *Pleading. Construction of railroad.*

Where an abutting owner sues a railroad company for damages and charges in his declaration that his damages were caused by the construction of the railroad by an independent contractor who had contracted with the railroad to construct such road according to plans and specifications of the chief engineer of the railroad company and that when completed the contractor turned the railroad over to defendant and the same was accepted by it. A special plea, that defendant was not responsible because, at the time of the injury, it had nothing to do with the railroad so constructed, the work having been done by an independent contractor and that the railroad company did not acquire the line until after the damage had been completed, was demurrable, because such plea does not deny the allegations of the declaration that the construction company was to construct the road according to the plans and specifications furnished it by the chief engineer of the defendant railroad company, nor allege that it was the way the construction company performed its work and not the performance of the work itself, which caused the injury. *Ib.*

6. *Municipal corporations. Special counsel. Injunction.*

A city or county may make a valid contract to employ associate counsel to assist its regularly retained counsel in any case where in the wisdom of the authorities it deems it necessary. *Water Works Co. v. Vicksburg*, 132.

7. *Injunction. Special counsel.*

Where a city employs additional counsel to dissolve an injunction against it, the injunction bond given to obtain such injunction can be made to respond in damages to any reasonable amount necessary to compensate the additional counsel so employed. *Ib.*

8. *Eminent domain. Estoppel. Constitution 1890, section 17.*

The owner of property is not estopped to claim damages resulting in the change of grade of a street, because he signed a petition to the

DAMAGES.

DAMAGES—Continued.

mayor and board of aldermen asking that the street be paved.
Robinson v. City of Vicksburg, 439.

9. *Same.*

Constitution 1890, section 17, provides "that property shall not be taken or damaged for public use, except on due compensation being first made to the owner thereof," and this constitutional right is not waived by the owner signing a petition for the paving of a street where there is no express waiver in the petition of the right to claim damages. *Ib.*

10. *Peremptory instruction. Jury.*

Where there is no issue of fact for the jury to try as to defendant's liability for damage the court should give a peremptory instruction for plaintiff as to liability. *Ib.*

11. *Prejudicial error. Instructions.*

In a suit by an abutting property owner against a city for damages to his property caused by a change in the grade of a street where the liability of the city was unquestioned, it was prejudicial error to admit in evidence a petition, signed by plaintiff for the paving of the street in question and to refuse to instruct the jury to find for the plaintiff on the question of liability. *Ib.*

12. *Same.*

Such erroneous action of the court was calculated to cause the jury in determining both the question of liability and the quantity of damages to render a compromise verdict as to the latter. *Ib.*

13. *Actions. Negligence. Proof. Variance. Personal injury. Code 1906, section 1985.*

In an action for damages for personal injuries where the declaration charges gross negligence and intentional wrong, the plaintiff may recover actual damages where only negligence is shown as the allegation of gross negligence includes negligence, the greater including the less. *Hollingshed v. Y. & M. V. R. R. Co.*, 464.

14. *Want of ordinary care. Physical and mental suffering.*

In an action for personal injury where the evidence shows that the injury complained of was the result of a want of ordinary care alone on the part of defendant, the plaintiff should recover not only for medical bills and loss of time, but also for physical pain, and men-

DECLARATION.

DAMAGES—Continued.

tal suffering as the result thereof, as these are all elements of actual damages. *Hollingshed v. Y. & M. V. R. R. Co.*, 464.

15. *Master and servant. Assumption of risk.*

Where a declaration alleges that defendant was master and plaintiff his servant, and that defendant owed plaintiff the duty to furnish him a safe place to work, that it was plaintiff's duty to look after a seed conveyor, a dangerous piece of machinery, which it was defendant's duty to guard; that it consisted of a spiral screw revolving near the floor, around which cotton seed was dumped to be carried by the screw to another department; that plaintiff's duty was to see that the screw was not clogged and that in doing so he had to pass along and step over the screw, and that defendant knew that the screw was dangerous and required a guard, but failed to guard it, and while plaintiff was attending to the conveyor, the seed having been dumped on the end of it, struck plaintiff's leg and knocked it against the screw injuring him, and further alleging that had defendant protected the screw, plaintiff would not have been injured, and that defendant was negligent in not guarding it, and that such negligence was the proximate cause of the injury. *Held*, that the declaration stated sufficient facts to constitute a cause of action against the defendant. *Know v. Cotton Oil Co.*, 880.

16. *Same.*

Such a declaration was not demurrable on the ground that it showed that the danger from the unguarded screw was obvious and that plaintiff assumed the risk, nor because it did not allege that the seed were dumped against plaintiff by defendant or that defendant had failed in any duty in that respect. *Ib.*

DECLARATION.

1. *Breach of warranty. Remedy. Essentials. Purchase of outstanding title. Liability of grantor.*

While in order to sustain the technical action of covenant for a breach of general warranty, there must be either an actual eviction by judicial process, or a surrender of possession to a valid, subsisting, paramount, legal title, asserted against the covenantee, or that there must be a holding of the grantee out of possession by such title, so that he could not enter, yet there are two other remedies that the covenantee may invoke without waiting for eviction or surrender of the premises. These other two actions are *assumpsit*, or *suit in chancery*. *Coopwood v. McCandless*, 364.

DECREE—DEED.

DECLARATION—Continued.

2. *Essentials. Code 1906, section 729.*

Under Code 1906, section 729, requiring a declaration to contain a statement of the facts constituting the cause of action in ordinary and concise language, a declaration is sufficient, if it states a good cause of action, no matter what may be its form or the name given it by the party filing it. *Ib.*

DECREE.

See JUDGMENT AND DECREE.

DEDICATION.

Acceptance. Municipalities.

Where the owner made a survey of his land, laying it off into blocks, lots, streets and avenues and later sold the blocks and lots with reference to such streets and avenues, and afterwards the corporate limits of the city were extended so as to include said land, and the city assessed the blocks and lots of this addition for taxation, but not the streets and avenues, and the city worked a portion of the streets shown on such addition but not the particular street upon which the accident occurred. *Held*, that these facts constitute a dedication to and an acceptance by the city of the dedication to public use of the streets and avenues of such addition and renders the city liable for damages occasioned by its failure to keep up and repair such streets and avenues. *City of Jackson v. Laird*, 476.

DEED.

1. *Parol evidence. Parol warranty.*

Where a grantor on delivering to the grantee a quitclaim deed to land, said "that the deed was good and he would stand behind it." This only tended to prove a warranty by parol, as to which the deed controls. *Lumber Co. v. Lumber Co.*, 19.

2. *New promise. Consideration. Statute of limitations. Code 1906, section 3115.*

Code 1906, § 3115, provides that the completion of the period of limitation shall defeat the right and remedy, but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon. Where a husband and wife made a warranty deed to land

DEED.

DEED—Continued.

and six years thereafter, for the same consideration made another deed to the same party, reciting that it was given to correct a former deed, the six year statute of limitations against an action on the warranty commences to run from the date of the second deed, as the last deed is a new promise of warranty based on a former valid consideration. *Wade v. Barlow*, 33.

3. *Breach of warranty. Measure of damages.*

The measure of damages for a breach of warranty is the money which the vendee has been and will be forced to expend for the protection of his possession and the perfection of his title and such other damages as may have been covered by the breach of warranty and not necessarily the whole purchase price. *Ib.*

4. *Acquisition of outstanding title.*

It is a well established general rule that where the purchaser has been put in possession, he cannot afterwards acquire a title and set it up in opposition to the vendor. If he extinguish an incumbrance or buy in an outstanding title, all he can ask or require is the payment of the money he has so laid out. *Ib.*

5. *Same. Privity of estate. Husband and wife.*

This rule is equally operative, whether the purchaser of the incumbrance is by the vendee or his wife. There is such an identity between them that what under such circumstances cannot be done by the husband cannot be done by the wife. The privity of estate between the vendor and vendee is what prevents the purchase. *Ib.*

6. *Covenants of warranty. Breach. Damages. Subrogation.*

The limit of a warrantor's liability for breach of warranty is the amount of the purchase price with interest, but the warrantor can only be made to pay the warrantee the actual amount paid out by him to protect his title. *Allen v. Miller*, 75.

7. *Duty of warrantee.*

While the warrantee is not put to the useless expense of a fruitless litigation against an incumbrance or paramount title that must eventually prevail, yet he assumes the risk of judging correctly as to the title or incumbrance which he buys in, and must establish, as a condition precedent to his recovery either at law or equity, that it was a paramount title or lien covered by his warranty and that he acted under a necessity to save the estate. *Ib.*

DEED.

DEED—Continued.

8. *Fraud. Confidential relation. Cancellation. Consideration.*

Where illiterate parents believing that they were only executing a deed of trust on their lands to raise money to pay off a lien thereon, conveyed their lands to a son, the only consideration being that the son assumed the incumbrance which was much less than the value of the land, and immediately on discovering the fraud which had been perpetrated upon them took steps to cancel their deed, they were entitled to relief. *Webb v. Webb*, 234.

9. *Confidential relations.*

In such case on account of the confidential relations between the parties the court should scrutinize the transaction more closely than if the transaction had been between strangers. *Ib.*

10. *Cancellation. Prior incumbrance.*

Where a grantee obtaining a deed by fraud, executes a deed of trust to a third party to obtain money to pay off a prior incumbrance on the land conveyed to him, the grantor as a condition to a decree setting aside the deed to the grantee and the deed of trust, must pay to the third person the amount of the loan so used. *Ib.*

11. *Corporation. Seals. Ejectment. Legal title. Code 1906, sections 901, 2766, 4631.*

Under Code 1906, section 901, section 2766 and 4631 authorizing corporations to adopt a seal and to convey land under the corporate seal and abolishing the distinction between sealed and unsealed instruments made by private persons, a deed to land by a corporation made in this state, not under its corporate seal does not convey the legal title and cannot be availed of in an action of ejectment where the plaintiff must have the legal title. *Littelle v. Lumber Co.*, 241.

12. *Release of claim for damages. Parol evidence to vary writing.*

Where the owner of a tract of land conveyed a part of it to a railroad company for a right of way for its railroad track and for railroad purposes, all damages resulting to the rest of the tract were thereby released and the fact that, simultaneously with the execution of this deed, another deed was made to another party by which he divided the land into separate lots, does not alter the situation. *Irwin v. Railroad*, 394.

13. *Parol evidence to vary written agreement.*

Where the owner of land conveyed it to a railroad company "for a right of way for its railroad tracks and for railroad purposes," the

DEED OF TRUST—DEFINITION.

DEED—Continued.

fact that there was a verbal agreement, not included in the written agreement between the railroad company and the owner that a portion of the lands so conveyed should be used only for depot purposes, cannot be shown by parol evidence. *Ircin v. Railroad*, 394.

DEED OF TRUST.

Substituted trustee. Appointment. Attorney in fact. Code 1906, section 3108.

The attorney in fact of the beneficiary of a deed of trust cannot appoint a substitute trustee, where the deed provides for the appointment, "by the beneficiary or any holder of the notes secured or their legal representatives." *Mortgage Co. v. Butler*, 56.

DEFINITIONS.

1. *Mixed or accommodation train.*

"A mixed or accommodation train" is a train equipped and having the appliances and facilities suited for the carriage of passengers as well as freight. Its purpose and business is as much the one as the other. In its arrangements the safety of passengers is as much looked to as the carriage of freight. It usually has two or more coaches for passengers and separate compartments or coaches for the races, and a baggage compartment or car, etc., and runs on a regular schedule, and subordinates its freight business to the passenger business to the extent necessary to make connections with other passenger trains on its own line and those on connecting roads, and it stops opposite stations for the convenient ingress and egress of passengers. *White v. I. C. R. R. Co.*, 652.

2. *Freight train.*

A freight train not intended for both passengers and freight within the Code 1906, section 4054, limiting the liability of carriers for injuries to passengers on such trains, is one on which passenger business is subordinated to the carriage of freight and is a mere incident thereto. *Id.*

3. *Par. Par value. Commercial paper.*

The words "par" and "par value" as applied to commercial paper have a well settled meaning in commercial law and consequently are not subjects of expert testimony. *Smith v. State*, 859.

DEMAND DEPOSITS—DRAINAGE DISTRICTS.

DEMAND DEPOSITS.

See BANKS.

DEMURRER.

1. *Criminal law. Code 1906, section 1377. Threatening letter.*

A demurrer to an affidavit charging the sending of a letter as shown in this case was properly sustained, the letter on its face not containing any threat within the meaning of section 1377, Code 1906. *State v. Jamison*, 248.

2. *Confined to record.*

In passing on a demurrer the court is confined to, and cannot take into consideration matters *aliunde* the record. *Ib.*

3. *Equity pleading.*

Grounds of demurrer which do not go to the whole bill cannot be considered on the hearing of a general demurrer to the bill. *Jones et al. v. Jones*, 600.

DRAINAGE DISTRICT.

1. *Petition to establish. Sufficiency. Bonds. Interest. Code 1906, sections 1684, 1703, 1706, 2709. Acts 1906, chapter 142. Constitution 1890, section 90.*

Under Code 1906, section 1684, and Acts 1906, chapter 132, section 3, requiring that a petition to create a drainage district, "should set forth or show the names of the owner of the several tracts of land mentioned therein to be embraced in the district." A petition which in one paragraph describes the land to be embraced within the district and in the next paragraph recites that the land embraced in the proposed district belonged to the following named persons with the postoffice address of each following his name and then recites a list of all landowners with their postoffice address, without stating what particular land was owned by each, was a sufficient compliance with the statute. *Halcy v. Drainage Commissioners*, 556.

2. *Bonds. Interest. Code 1906, sections 1703, 1706, 1709. Acts 1906.*

Sections 1703 and 1706 of Code 1906 and the corresponding sections of acts 1906 authorize the payment of interest on drainage bonds, and section 1709 of Code 1906 and the corresponding sections of acts 1906 provides both for the payment of this interest annually and for the collection of the money necessary so to do by assessment made by the board of supervisors. *Ib.*

DYING DECLARATION.

DRAINAGE DISTRICT—Continued.

3. *Code 1906. What included.*

The Code of 1906 consists of the matter included in the enrolled bill containing same filed in the office of the secretary of state and this enrolled bill includes chapter 39, and the fact that this chapter was omitted from section 1, chapter 1, of Code, which section designated what chapters should constitute the Code, makes no difference. *Haley v. Drainage Commissioners*, 556.

4. *Constitution 1890, section 90. Acts 1906, chapter 132. Code 1906, sections 1682 and 1727. Local laws.*

Constitution 1890, section 90, prohibiting local laws in regard to watercourses, has no reference to artificial watercourses and does not invalidate acts 1906, chapter 132, nor Code 1906, sections 1682 and 1772, because counties are exempted from the provisions of the act, as it is immaterial whether these statutes are local or general. *Ib.*

5. *Drains. Property assessable. Constitution, section 170. Code 1906, section 1721. Board of supervisors.*

Code 1906, section 1721, providing that if, in the organization of a drainage district and the construction of ditches and drains thereunder, any public road or railroad or turnpike shall be benefited by said system of drainage, the said commissioners shall have the right to assess said road, public road, rail roads benefited, etc., is violative of section 170 of the Constitution 1890, in so far as said act confers on the drainage commissioners power to assess the public roads with such an amount as they may deem said roads benefited by the drainage district, since under said section 170 of the Constitution, "the boards of supervisors have full jurisdiction over roads, etc." *Supervisors v. Drainage District*, 739.

6. *Statutes. Validity.*

Where a part of a drainage act is unconstitutional, but the invalid portion of the statute is clearly separable from the balance, and there is left a consistent drainage scheme, the balance of the act is not affected thereby. *Ib.*

Also see WATERCOURSES.

DYING DECLARATION.

See EVIDENCE.

EJECTMENT—EMINENT DOMAIN.

EJECTMENT.

Corporation. Deeds. Seals. Legal title. Code 1906, sections 901, 2766, 4631.

Under Code 1906, section 901, section 2766 and 4631 authorizing corporations to adopt a seal and to convey land under the corporate seal and abolishing the distinction between sealed and unsealed instruments made by private persons, a deed to land by a corporation made in this state, not under its corporate seal does not convey the legal title and cannot be availed of in an action of ejectment where the plaintiff must have the legal title. *Littelle v. Lumber Co.*, 241.

EMBEZZLEMENT.

1. *Criminal law. Indictment. Ownership of property. Evidence. Variance.*

The rules of law in cases of larceny, with reference to alleging and proving the ownership of the property charged to have been stolen, apply with equal force to the crimes of embezzlement, false pretenses and other kindred offenses. *Hampton v. State*, 176.

2. *Evidence. Variance.*

The "American Express Company, a corporation," is a materially different concern from the American Express Company, a partnership, and an indictment for embezzling the funds of one cannot be sustained by proof that the funds belong to the other. *Ib.*

EMINENT DOMAIN.

1. *Damages. Estoppel. Constitution 1890, section 17.*

The owner of property is not estopped to claim damages resulting in the change of grade of a street, because he signed a petition to the mayor and board of aldermen asking that the street be paved. *Robinson v. City of Vicksburg*, 439.

2. *Same.*

Constitution 1890, section 17, provides "that property shall not be taken or damaged for public use, except on due compensation being first made to the owner thereof," and this constitutional right is not waived by the owner signing a petition for the paving of a street where there is no express waiver in the petition of the right to claim damages. *Ib.*

EQUITY—ESTATES OF DECEDENTS.

EQUITY.

See CHANCERY COURT.

ESCHEAT.

1. *Required proof. Presumptions. Survivorship of heirs.*

In an action of escheat the state must recover if at all upon the strength of its own title and not the weakness of that of the defendant. *State ex rel. v. Williams*, 293.

2. *Presumptions.*

The presumption of law that a person dying intestate has left heirs capable of inheriting his estate is one of the strongest presumptions known to law, because the presumption itself runs with the usual current of nature. *Ib.*

3. *Same.*

This presumption can only be overcome by positive proof of the want of persons capable of taking the estate under the laws of descent and distribution. *Ib.*

ESTATES OF DECEDENTS.

1. *Executors and administrators. Claims. Notice to creditors. Sufficiency. Code 1906, sections 2103 and 2107.*

Section 2107, Code 1906, providing, that all claims against the estate of decedents shall be filed within one year after publication of notice to creditors or the same shall be barred, was intended to expedite the settlement of estates by providing a short statute of limitations. *Marshall v. John Deere Plow Co.*, 284.

2. *Same.*

Section 2103, Code 1906, provides the method of putting the period of limitation, provided for in section 2107 into operation, and it can be put into operation in no other. This notice among other things must advise "all persons having claims against the estate to have the same probated and registered by the clerk of the court, granting letters, within one year, and that a failure to probate and register for one year will bar the claim." *Ib.*

3. *Probation of claims. Amendments.*

Where a claim is not probated against the estate of a decedent as required by law, its registration does not stop the running of the statute of limitations, and after the bar of the statute of limitations has attached the probate cannot be amended. *Lehman v. George*, 798.

ESTOPPEL.

ESTOPPEL.

1. *Replevin. Possession of property by defendant.*

An action of replevin is not maintainable where the defendant did not have possession of the property at the time of the institution of the suit, and did not execute any forthcoming bonds, nor authorize any one else to do so for him, nor ratify the act of another doing so; there can be no estoppel in such case. *Vaughn v. Huff*, 110.

2. *Landlord and tenant. Rent and supplies. Agent.*

Where a tenant sells cotton raised on the leased premises with the landlord's consent and the purchaser pays part of the proceeds to the landlord for his rent and the balance to the tenant and the landlord fails to disclose to the purchaser when he is paid the rent that he has also a claim for supplies, he is estopped from afterwards asserting his claim for supplies against the purchaser. *Seavey and Sons v. Godbold*, 113.

3. *Same.*

In such case the tenant is the agent of the landlord to make the sale of the cotton and if he fails to account for the proceeds of the sale the purchaser cannot be made to suffer on account thereof. *Ib.*

4. *Eminent domain. Damages. Constitution 1890, section 17.*

The owner of property is not estopped to claim damages resulting in the change of grade of a street, because he signed a petition to the mayor and board of aldermen asking that the street be paved. *Robinson v. City of Vicksburg*, 439.

5. *Same.*

Constitution 1890, section 17, provides "that property shall not be taken or damaged for public use, except on due compensation being first made to the owner thereof," and this constitutional right is not waived by the owner signing a petition for the paving of a street where there is no express waiver in the petition of the right to claim damages. *Ib.*

6. *Payment of forged paper.*

Where a bank pays a check drawn by a depositor to the wrong person, the endorsement having been forged and afterwards renders an account to the depositor in which the payment of such check is shown and the depositor receives the same without objection, he is not estopped from suing the bank, as estoppel *in pais* only operates in favor of one who, induced by the acts or representations of an-

EVIDENCE.

ESTOPPEL—Continued.

other, so changes his position that injury would result if the truth were known. *Benefit Association v. Bank*, 610.

7. *Same.*

Where the depositor neither by act nor representation, induced the bank to pay out money on a forged indorsement, the depositor is entitled to assume that his check, payable to order, will not be paid by the bank until it shall have assured itself that the necessary endorsement appearing thereon is genuine. *Ib.*

EVIDENCE.

1. *Fraudulent conveyance. Sale in bulk. Presumptions. Laws 1908, chapter 100.*

The first section of Laws 1908, chapter 100, declares "that a sale of any portion of a stock of merchandise, other than in the ordinary course of trade, or irregular and usual prosecution of the seller's business, and a sale of the entire stock of merchandise in gross shall be presumed to be fraudulent and void as to creditors of the seller unless . . ." A sale in violation of this paragraph is not conclusively presumed to be fraudulent and void as to the creditors of the seller, but the presumption of fraud can only be rebutted by the purchaser at such sale by his showing a compliance with subsections a, b and c of said act. *Dry Goods Co. v. Rowe & Carithers*, 30.

2. *Criminal law. Remarks of district attorney.*

Where the district attorney in a prosecution for selling intoxicating liquor referred to the house of accused as a low dive where whiskey and beer was, and where girls stayed and men visited, and said you know what that means; and upon objection to such remarks the court stated, "very well, I think the evidence substantiates that," and admitted evidence tending to show these facts. The conduct and remarks of the district attorney as approved by the court and the error in admitting such evidence prevented accused from having a fair trial. *Collins v. State*, 52.

3. *Improper evidence.*

In a trial or the illegal sale of intoxicating liquors, it is improper to allow evidence tending to show that accused kept a bawdy house; such testimony is foreign to the issue being tried. *Ib.*

EVIDENCE.

EVIDENCE—Continued.

4. *Contempt proceedings. Sufficiency.*

In a contempt proceeding for interfering with a decree awarding the custody of a minor child to his father and depriving the defendants of his custody, evidence that defendant gave the minor bread to eat, shelter under their roof and refused to take him back to his father's house, coupled with the fact that defendants did not entice the boy away from his father and made no effort to detain him at their home is not sufficient to warrant defendant's conviction for contempt. *Magee v. State*, 83.

5. *Carriers. Passengers. Master and servant.*

Where deceased in company with another got upon the platform of a passenger train of appellant about ten o'clock at night, intending to ride a distance of about a mile, the fare being five cents and the conductor did not see these two parties on the platform, nor did they offer to pay fare, though the companion of deceased testified that they were ready and willing to pay same and expected to do so when the conductor should ask them. Whether under these circumstances decedent was a passenger was a question for the jury. *Railroad Co. v. Sanderson*, 148.

6. *Criminal law. Infant. Intent. Burden of proof.*

Criminal intent is an essential element of crime. An infant under the age of seven years is by law conclusively presumed to be incapable of distinguishing between right and wrong and therefore incapable of entertaining criminal intent. *Miles v. State*, 165.

7. *Same.*

An infant between the ages of seven and fourteen years is *prima facie* presumed to be incapable of entertaining criminal intent, but this *prima facie* incapacity to commit crimes may be overcome by proof that the infant is in fact mentally capable of distinguishing between right and wrong, but the burden of proof in such case is upon the state. *Ib.*

8. *Same. Previous threats.*

In a case of assault and battery with intent to kill, where the evidence is conflicting as to who was the aggressor, previous threats of the prosecutor whether communicated to the accused or not are admissible in evidence for the purpose of throwing light on the question as to who was the aggressor in the difficulty. *Ib.*

9. *Criminal law. Credibility of witnesses. Instructions.*

Where one of the witnesses for the state was employed as a detective to report "blind tigers," and testified that he was working for a

EVIDENCE.

EVIDENCE—Continued.

salary and that the amount he was to receive did not depend upon the number of cases reported by him, but defendant proved that such witness had received one hundred dollars for nine cases of detective work, and offered to introduce an account filed by the witness with the board of aldermen, upon which said amount was allowed. It was error for the court to refuse to allow this account to be introduced as this might have materially affected his credibility with the jury. *Pederre v. State*, 171.

10. *Instructions. Weight of evidence.*

An instruction for the state is erroneous which tells the jury, "That they are not authorized under the law to disregard the testimony of the witness merely because he is employed as a detective, but they must give the testimony of such witness the same credence as that of any other witness, unless they believe from the testimony that such witness has knowingly and corruptly sworn falsely to a material fact in issue," as being upon the weight of evidence and the credibility of witnesses, which are matters peculiarly within the province of the jury, whose judgment should not be influenced by the views of the court in relation thereto. *Ib.*

11. *Admissibility.*

In a prosecution for embezzlement, testimony of defendant's assistant in an express office, that four or five months before the office was set on fire and a shortage discovered, while he and defendant were on their way to the depot to meet a train, the appellant told him he was expecting the supervising agent of the express company, and handed witness a note in an envelope and instructed him to return to the office, which witness did and if he (the appellant) telephoned him that the superior agent had come, to deliver the envelope to the Farmers Bank and take what the bank gave him and put it in the "pony safe," that when the train came, he received a message, but not from appellant, but the depot agent, that the supervising agent of the express company had come; that thereupon he delivered the envelope to the bank and got from it a package marked on the back, four hundred and ninety dollars, which he put in the safe, and which was there when the supervising agent came, was not subject to the objection that it related to another crime, since it tended to prove the specific crime. *Hampton v. State*, 176.

12. *Hearsay. Same.*

Such testimony was not objectionable as being hearsay evidence, as it was competent to show upon what information witness acted. *Ib.*

EVIDENCE.

EVIDENCE—Continued.

13. *Seduction. Corroboration. Criminal Law. Code 1906, section 1372.*

The allegations of an indictment under Code 1906, section 1372 that the woman seduced was "of previous chaste character" and that the carnal knowledge was obtained "by virtue of a false or feigned promise of marriage" cannot be maintained on the testimony of the prosecutrix alone, she must be corroborated by evidence upon these two points. *Carter v. State*, 200.

14. *Criminal law. Instructions.*

In a case of circumstantial evidence, an instruction for the state that "circumstantial evidence may arise so high in the scale of belief as to generate full and complete conviction beyond a reasonable doubt of defendant's guilt; and if it does rise so high in the scale of belief as to generate full and complete conviction of defendant's guilt beyond a reasonable doubt in the minds of the jury, then they are authorized to act upon it and convict the defendant," is fatally erroneous in failing to add that such evidence should exclude every other reasonable hypothesis than that of defendant's guilt. *Miller v. State*, 226.

15. *Books of account. Witness.*

In a suit upon a verified itemized account where the only question involved was one of overcharge and the items themselves as shown on the copy of the account sued on were not denied in the counter affidavit, it is still true that the question of overcharge involved the books of account and the books themselves are the best evidence and it was reversible error to allow a witness to use the itemized account to refresh his memory and testify that it was a copy of the books when it was not shown that the books themselves were correct. *Hoye v. Lumber Co.*, 229.

16. *Judgment. Correction.*

On a motion to correct an erroneously entered judgment, any evidence of parol, or other kind, is competent, which throws material light on the truth of the matter, but where there is nothing but mere parol evidence, such evidence should be very carefully and closely scrutinized. *Wilson v. Town of Handsboro*, 252.

17. *Criminal law. New trial.*

It is the general rule that courts will grant with great reluctance, new trials founded on newly discovered evidence, especially when such evidence is merely cumulative, but where the newly discovered evidence is corroborative, the rule is not enforced with the same

EVIDENCE.

EVIDENCE—Continued.

strictures as where it is merely cumulative. *Williams v. State*, 274.

18. *Cumulative. Corroborative.*

Cumulative evidence is evidence of the same kind as that already given to the same point. Evidence establishing the disputed fact by other circumstances than those shown on the trial is corroborative evidence and, when newly discovered authorizes a new trial. *Ib.*

19. *Same.*

All cumulative evidence is necessarily corroborative, but all corroborative evidence may not be cumulative. *Ib.*

20. *Rape. Newly discovered evidence.*

Where on a trial for rape of a child under twelve years of age the age of the child was left in doubt by the evidence and it appears from newly discovered evidence that such doubt would probably be removed, a new trial should be granted on this ground. *Ib.*

21. *Criminal law. Arson.*

Where on a trial for arson the burning of the house was abundantly shown, but the only evidence that the burning was caused by a criminal agency was an alleged confession by accused and several slight circumstances tending to establish such criminal agency, but wholly insufficient for that purpose, a conviction will be reversed. *Ratcliff v. State*, 277.

22. *Pre-nuptial contracts. Identification.*

While pre-nuptial contracts are to be construed liberally in favor of the wife, this should not be so extended as to overturn the statute of frauds. *Cole v. Cole*, 335.

23. *Parol evidence.*

The rule is that if the description contained in the writing points to specific property, parol evidence is admissible to identify it because that is certain which is capable of being made certain. *Ib.*

24. *Same. Statute of frauds. Insufficient description.*

Under Code 1906, section 4775, requiring a contract in consideration of marriage or to sell lands to be in writing, a contract in consideration of marriage to convey either one of four tracts of land worth twenty-five hundred dollars each and owned by the husband without other description is void for uncertainty in description. *Ib.*

EVIDENCE.

EVIDENCE—Continued.

25. Criminal law. Homicide. Admissibility. Conduct of judge. Coercion of jury.

The jury, when it retires to consider its verdict, should be left absolutely free from any and all outside influences so that it may consider the case submitted to them with perfect freedom. *Wiltcher v. State*, 374.

26. Same.

Where the jury retired to consider of their verdict between seven thirty and eight o'clock Friday evening and on the following Saturday evening sent a note to the judge, through the bailiff, "asking permission to take a walk on Sunday morning and evening," and saying that they were hopelessly hung, and the judge sent them word by the bailiff that "he would receive a verdict, if it was brought in by nine o'clock, but if not, he was going to Hazlehurst and would not be back until Monday morning," and that he would not receive a verdict on Sunday, and further gave the jury permission to take a walk on Sunday morning and evening; and the jury reached a verdict about nine o'clock Saturday night. *Held*, that the message of the judge was not an improper communication to the jury and had no tendency to coerce them into a verdict. *Ib*.

27. Dying declaration. Admissibility. Homicide.

Where the dying man when told a few minutes after he had been shot that a doctor had been sent for said, "the doctor can't do me any good, I won't be here long," and then made a statement as to how he was killed, which was in substance the same as the statement he made to another witness some twelve hours later; and the testimony showed that the dying man grew weaker and weaker until he died and never at any time expressed any hope of recovery. *Held*, that the admission in evidence of the last declaration was not error. *Ib*.

28. Homicide. Admission of evidence. Harmless error.

In a murder case, the admission of evidence that decedent's wife, shown to have been a conspirator with accused, had told witness, at a time before the conspiracy was formed, that she, the wife, was going to have her husband killed, and testimony of a witness that, while she and another, conspirator with accused, were going to decedent's house the night that he was killed, such conspirator stated to witness, some ten or fifteen minutes before the fatal shot was fired, and when the conspirator was not more than ten or twenty yards from the spot where decedent was killed that he,

EVIDENCE.

EVIDENCE—Continued.

the conspirator, was going to kill decedent, and that, if he did not, accused and another would kill such conspirator that night or early the next morning, though erroneous, was harmless error, where the indictment charging accused with murder was legally returned, and he was tried by an impartial jury, and the evidence established his guilt, inasmuch as the improper evidence did not deprive accused of a substantial right, and could not possibly have changed the verdict. *Wiltcher v. State*, 374.

29. *Deeds. Release of claim for damages.*

Where the owner of a tract of land conveyed a part of it to a railroad company for a right of way for its railroad track and for railroad purposes, all damages resulting to the rest of the tract were thereby released and the fact that, simultaneously with the execution of this deed, another deed was made to another party by which he divided the land into separate lots, does not alter the situation. *Irwin v. Railroad*, 394.

30. *Parol evidence to vary written agreement.*

Where the owner of land conveyed it to a railroad company "for a right of way for its railroad tracks and for railroad purposes," the fact that there was a verbal agreement, not included in the written agreement between the railroad company and the owner that a portion of the lands so conveyed should be used only for depot purposes, cannot be shown by parol evidence. *Ib.*

31. *Criminal law. Conspirators. Credibility of witnesses. Completion of offense. Code 1906, section 1028.*

The question of the credibility of a witness is one which belongs exclusively to the jury. *Osborn v. State*, 410.

32. *Accomplice. Credibility.*

While the testimony of an accomplice should be received and weighed with great distrust and jealousy by the jury, it is still the province of the jury to determine what credit to give to the testimony of an accomplice from his manner and general appearance upon the stand and all other surrounding and attending circumstances and it is the jury's privilege, if they see proper, to believe him without corroboration. *Ib.*

33. *Admission of conspirators. Admissibility.*

Where a conspiracy has been established, the admissions of one or more of the conspirators are admissible to affect their associates

EVIDENCE.

EVIDENCE—Continued.

only when made during the progress or in the prosecution of the unlawful design about which they have conspired; and hence if made after its completion, or abandonment, they are inadmissible. *Ib.*

34. *Same.*

Acts or declarations of conspirators are not always excluded because they were done or made after the commission of the crime. If for any reason as for escape or concealment, division of profits, or realization of benefits, the common purpose continued, declarations in furtherance thereof are admissible, although the crime which was the object of the conspiracy has been consummated.

Where a defendant is charged together with several co-conspirators with burning a stock of goods with intent to defraud an insurance company, a plea of guilty by his co-conspirators to an indictment charging them with burning the house in which the goods were located at the time of the burning is admissible to show that the fire was of incendiary origin. But this evidence was not competent for the purpose of proving that the intent was to defraud the insurance company, nor was it competent to show that defendant had any guilty connection whatever with the other conspirators in the unlawful burning. *Ib.*

35. *Code 1906, section 1026.*

While it is true that under Code 1906, section 1026, an accessory can be tried and punished as a principal, before or after the principal has been tried, nevertheless, where several are indicted jointly for a felony, if the evidence shows that one or more were accessories before the fact, though charged in the indictment as principals, it is absolutely necessary to prove the party guilty who actually committed the felony before proof can be secured of the guilt of the accessories before the fact, although they are charged in the indictment as principals. *Ib.*

36. *Criminal conspiracy.*

Before the declarations of one party can be received in evidence against another in a criminal prosecution there must be proof of a conspiracy *aliunde*, but a conspiracy can be proven like other controverted facts, by the acts of the parties or by circumstances, as well as their agreement. *Ib.*

37. *Homicide. Admission. Harmless error.*

In a prosecution for murder wherein defendant was convicted of manslaughter, testimony tending to show neglect by the defendant

EVIDENCE.

EVIDENCE—Continued.

of his wife under the facts of this case was harmless error. *Carter v. State*, 435.

38. *Cross-examination of accused. Harmless error.*

Where the defendant on cross-examination was asked by counsel for the state, if his wife would testify and also whether he would object to his wife being introduced as a witness for the state, and both these questions were objected to and the objection sustained by the court, *held*, that while these questions were highly improper and should not have been asked, it was not reversible error. *Ib.*

39. *Criminal law. Instructions.*

While it is true that a conviction may be had on circumstantial evidence alone, when by it guilt is proven beyond a reasonable doubt, it is equally true that it must exclude every other reasonable hypothesis than that of guilt. *Permenter v. State*, 453.

40. *Foreign judgment. Certification. Attachment. Code 1906, section 171.*

A judgment recovered in another state cannot be proved or admitted in the courts of this state as evidence of the fact, until there has been a compliance with section 905 of the Revised Statutes of the United States. *McLin & Co. v. Worden*, 547.

41. *Section 171, Code 1906. Attachment.*

Under section 171, Code 1906, a defendant is entitled to have his damages assessed for the wrongful suing out of a writ of attachment, if the question of indebtedness be decided in his favor, although the grounds upon which the attachment was sued out were not contested by him and is not compelled to bring a new and independent suit on the bond. *Ib.*

42. *Uncommunicated threats.*

Uncommunicated threats are admissible on the trial of a criminal case when there is a conflict in the testimony as to who was the aggressor, where they throw light on the significance of the acts of the deceased. *Echols v. State*, 683.

43. *Conditional threats.*

On the trial of a homicide case conditional threats of deceased are admissible, where the condition of the threats of deceased had materialized. *Ib.*

EVIDENCE.

EVIDENCE—Continued.

44. *Fire insurance. Description of property.*

Where by mistake the property insured under a fire insurance policy is described as being in section 11 instead of section 2, this is immaterial where there is sufficient left in the policy after rejecting the erroneous description to identify the situation of the property insured, although the policy provides that it shall be void if this insured has misrepresented any material fact concerning the subject-matter. *Shivers v. Fire Insurance Co.*, 744.

45. *Intention. Admissibility.*

Parol evidence is not admissible to so extend the terms of the policy as to cover property not intended in the description, but it may be received for the purpose of applying the description to the property intended to be described. *Ib.*

46. *Criminal law. False pretenses. Instructions.*

Where on the trial of accused for obtaining money under false pretenses by representing himself to be the agent of an adjusting company, the issue was whether or not he had been discharged by the company before the occurrence of the transaction complained of. It was error to allow the superintendent of agents of the company to testify that the books of the company showed that accused had been discharged several months before the date of the alleged offense, he having no personal knowledge of the fact, this testimony was hearsay. *Buford v. State*, 770.

47. *Criminal intent. Good faith.*

Where accused was charged with obtaining money under false pretenses by contracting in the name of a company and obtaining money thereon and by representing himself as the agent of such company and the issue was whether or not he had been previously discharged by the company. It was error for the court to refuse him an instruction that even though he was not in the employ of the company at the time of making the contract, but was ignorant of the fact that he had been discharged and acted in good faith in making the contract and obtaining the money, then he was not guilty of the crime charged. *Ib.*

48. *Criminal law. Admissions by third persons.*

Testimony going to show confessions and admissions on the part of third persons made out of court is not admissible in exculpation of those on trial for crime. *Brown v. State*, 719.

EXECUTORS AND ADMINISTRATORS.

EVIDENCE—Continued.

49. *Exclusion of testimony. Reversible error.*

Where on the trial of a party for murder the court excluded the following question, addressed on cross-examination to one of the two eye witnesses of the tragedy and brother to the deceased; "Wasn't there a crowd of men there, B. H. and several others, that Mr. McN. got together, there and told them they would have to hold the inquest and you were right there, and they couldn't get any testimony about who did the shooting, and found that he came to his death by an unknown hand?" *Held*, that the exclusion of this question was not reversible error. *Brown v. State*, 719.

50. *Admission of improper evidence.*

Where in a criminal case improper evidence is admitted for the state over defendant's objection and the court cannot say with confidence that no other verdict than that of guilty could reasonably have been reached if such improper evidence had been excluded, the case will be reversed. *Tabor v. State*, 830.

EXECUTORS AND ADMINISTRATORS.

1. *Estate of decedents. Claims. Notice to creditors. Sufficiency. Code 1906, sections 2103 and 2107.*

Section 2107, Code 1906, providing, that all claims against the estate of decedents shall be filed within one year after publication of notice to creditors or the same shall be barred, was intended to expedite the settlement of estates by providing a short statute of limitations. *Marshall v. John Deers Plow Co.*, 284.

2. *Same.*

Section 2103, Code 1906, provides the method of putting the period of limitation, provided for in section 2107 into operation, and it can be put into operation in no other. This notice among other things must advise "all persons having claims against the estate to have the same probated and registered by the clerk of the court, granting letters, within one year, and that a failure to probate and register for one year will bar the claim." *Ib.*

3. *Powers. Code 1906, sections 2057 and 2058.*

An administrator is a statutory trustee whose duties and powers are fixed by law and cannot be enlarged by a decree of a court of chancery. *Alexander v. Herring*, 427.

EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS—Continued.**4. Administration. Powers and duties.**

A chancery court cannot authorize an administrator to engage in business with the funds of the estate. *Ib.*

5. Same.

The duty of an administrator consists in protecting the estate, winding up its affairs, collecting its assets and paying its debts and finally turning over to the court the net estate for distribution to those entitled to it.

Sections 2057 and 2058, Code 1906, expressly authorize the administrator to deal with growing crops and to cultivate or rent farm land, but an administrator under these sections is not authorized to buy timber and operate a sawmill and it is beyond the power of the chancery court to empower him to do so. *Ib.*

6. Same.

In the absence of a statute authorizing it, an administrator has no authority to incur debts, binding on the estate, except for incidental expenses in due course of the administration of the estate. *Ib.*

7. Claims against estate of decedent. Proof. Code 1906, section 2106.

Under Code 1906, section 2106, requiring any person desiring to probate his claim against the estate of a decedent to present to the clerk a statement of his claim in writing signed by the creditor and to make affidavit to be attached thereto; a statement of the claim of the creditor with an affidavit of the creditor signed by the creditor attached thereto is sufficient, the purpose of the statute being to identify it and verify its correctness. *Bankston v. Coopwood*, 511.

8. Same.

A substantial and not a literal compliance with the statute is all that is required. *Ib.*

9. Letters revoked. Right to apply. Code 1906, sections 2093 and 2019.

Under Code 1906, section 2093, which provides that "when either of the parties to any personal action shall die before final judgment, the executor or administrator of such deceased party may prosecute or defend such action;" and section 2019, Code 1906, which provides that "an administrator may be appointed to institute and

FOREIGN JUDGMENT—GRAND JURY.

EXECUTORS AND ADMINISTRATORS—Continued.

conduct suits, whose power shall cease when the litigation is entirely closed. A railroad, defendant, in a pending suit for personal injury brought by a plaintiff who dies while the suit is pending, has no such interest as will entitle it to move for revocation of letters of administration granted to a party for the purpose of prosecuting such suit. *Railroad v. Jeffries*, 534.

FOREIGN JUDGMENT.

See JUDGMENT AND DECREE.

FORGERY.

1. *Public records. Cancellation of deed of trust. Indictment. Code 1906, § 1177.*

To justify a conviction of falsifying a record under Code 1906, § 1177, by entering a false satisfaction on the margin of the record of a trust deed, it must be charged in the indictment that the cancellation of the deed of trust by marginal entry on the record was attested by the chancery clerk and that this was done must be proven on the trial. *Poythress v. State*, 805.

2. *Same.*

The attestation of the clerk was necessary to give the cancellation legal efficacy or validity. *Ib.*

FRAUDULENT CONVEYANCE.

See CONVEYANCE.

GARNISHMENT.

See JUSTICE OF THE PEACE.

GRAND JURY.

1. *Criminal law. Indictment. Ownership of property.*

The rules of law in cases of larceny, with reference to alleging and proving the ownership of the property charged to have been stolen, apply with equal force to the crimes of embezzlement, false pretenses and other kindred offenses. *Hampton v. State*, 176.

GRAND JURY.

GRAND JURY—Continued.

2. *Criminal law. Proceeding. Presence of stenographer.*

Where a cause was under investigation by the grand jury, the district attorney had the testimony taken down by a stenographer introduced by him into the grand jury room for that purpose and all the stenographer did while in the grand jury room was to take down the evidence and this evidence was not discussed or commented upon in his presence by any member of the grand jury. *Held*, that this was not reversible error as the accused could not be prejudiced thereby. *Carter v. State*, 435.

3. *Same.*

Unless the court can say that a defendant was not prejudiced by the presence of an unauthorized party in the grand jury room the case will be reversed. *Ib.*

4. *Criminal law. False pretenses. Indictment. Requisites.*

An indictment for obtaining money under false pretenses under Code 1906, section 1166, charging that accused intending to cheat an insurer and the beneficiary in a life insurance policy, fraudulently pretended to the insurer that he was the beneficiary in the policy and that insured was dead, by means of which he obtained from insurer three hundred dollars and further charging that the policy was not the property of accused and that he was not the beneficiary therein named, and that insured was not dead, is fatally defective in failing to charge the ownership of the money obtained and in failing to charge that the beneficiary in the policy had not transferred or assigned it to accused. *State v. Hubanks*, 775.

5. *Public records. Forgery. Cancellation of deed of trust. Indictment. Code 1906, § 1177.*

To justify a conviction of falsifying a record under Code 1906, § 1177, by entering a false satisfaction on the margin of the record of a trust deed, it must be charged in the indictment that the cancellation of the deed of trust by marginal entry on the record was attested by the chancery clerk and that this was done must be proven on the trial. *Poythress v. State*, 805.

6. *Same.*

The attestation of the clerk was necessary to give the cancellation legal efficacy or validity. *Ib.*

HOMICIDE.

HOMICIDE.

1. *Criminal law. Dying declarations. Admissibility. Conduct of judge. Coercion of jury.*

The jury, when it retires to consider its verdict, should be left absolutely free from any and all outside influence so that it may consider the case submitted to them with perfect freedom. *Wiltcher v. State*, 374.

2. *Same.*

Where the jury retired to consider of their verdict between seven thirty and eight o'clock Friday evening and on the following Saturday evening sent a note to the judge, through the bailiff, "asking permission to take a walk on Sunday morning and evening," and saying that they were hopelessly hung, and the judge sent them word by the bailiff that "he would receive a verdict, if it was brought in by nine o'clock, but if not, he was going to Hazlehurst and would not be back until Monday morning," and that he would not receive a verdict on Sunday, and further gave the jury permission to take a walk on Sunday morning and evening; and the jury reached a verdict about nine o'clock Saturday night. *Held*, that the message of the judge was not an improper communication to the jury and had no tendency to coerce them into a verdict. *Ib.*

3. *Dying declaration. Admissibility.*

Where the dying man when told a few minutes after he had been shot that a doctor had been sent for said, "the doctor can't do me any good, I won't be here long," and then made a statement as to how he was killed, which was in substance the same as the statement he made to another witness some twelve hours later; and the testimony showed that the dying man grew weaker and weaker until he died and never at any time expressed any hope of recovery. *Held*, that the admission in evidence of the last declaration was not error. *Ib.*

4. *Admission of evidence. Harmless error.*

In a murder case, the admission of evidence that decedent's wife, shown to have been a conspirator with accused, had told witness, at a time before the conspiracy was formed, that she, the wife, was going to have her husband killed, and testimony of a witness that, while she and another, conspirator with accused, were going to decedent's house the night that he was killed, such conspirator stated to witness, some ten or fifteen minutes before the fatal shot was fired, and when the conspirator was not more than ten or

HOMICIDE.

HOMICIDE—Continued.

twenty yards from the spot where decedent was killed that he, the conspirator, was going to kill decedent, and that, if he did not, accused and another would kill such conspirator that night or early the next morning, though erroneous, was harmless error, where the indictment charging accused with murder was legally returned, and he was tried by an impartial jury, and the evidence established his guilt, inasmuch as the improper evidence did not deprive accused of a substantial right, and could not possibly have changed the verdict. *Ib.*

5. *Amission of evidence. Harmless error.*

In a prosecution for murder wherein defendant was convicted of manslaughter, testimony tending to show neglect by the defendant of his wife under the facts of this case was harmless error. *Carter v. State*, 435.

6. *Cross-examination of accused. Harmless error.*

Where the defendant on cross-examination was asked by counsel for the state, if his wife would testify and also whether he would object to his wife being introduced as a witness for the state, and both these questions were objected to and the objection sustained by the court, *held*, that while these questions were highly improper and should not have been asked, it was not reversible error. *Ib.*

7. *Murder. Manslaughter. Instructions.*

Where a defendant charged with murder is convicted of manslaughter he is presumed not to have been prejudiced by any instructions relating to the crime of murder. *Ib.*

8. *Provocation of difficulty. Uncommunicated threats.*

A father who learns of the seduction of his daughter has the right to seek the seducer for an explanation and for a peaceful adjustment of the matter; and in seeking this end, he has the further right to arm himself, not with the intention to provoke a difficulty, but to protect himself if necessary, in self-defense. *Echols v. State*, 683.

9. *Uncommunicated threats. Evidence.*

Uncommunicated threats are admissible on the trial of a criminal case when there is a conflict in the testimony as to who was the aggressor, where they throw light on the significance of the acts of the deceased. *Ib.*

HUSBAND AND WIFE.

HOMICIDE—Continued.

10. *Conditional threats.*

On the trial of a homicide case conditional threats of deceased are admissible, where the condition of the threats of deceased had materialized. *Echols v. State*, 683.

11. *Dying declarations. Preliminary proof.*

A statement is not admissible in evidence as a dying declaration in the absence of testimony showing that the deceased had abandoned all hope of recovery. *Brandon v. State*, 784.

HUSBAND AND WIFE.

1. *Acquisition of outstanding title.*

It is a well established general rule that where the purchaser has been put in possession, he cannot afterwards acquire a title and set it up in opposition to the vendor. If he extinguish an incumbrance or buy in an outstanding title, all he can ask or require is the payment of the money he has so laid out. *Wade v. Barlow*, 33.

2. *Same. Privity of estate. Husband and wife.*

This rule is equally operative, whether the purchase of the incumbrance is by the vendee or his wife. There is such an identity between them that what under such circumstances cannot be done by the husband cannot be done by the wife. The privity of estate between the vendor and vendee is what prevents the purchase. *Id.*

3. *Divorce and alimony. Lis pendens. Code 1906, sections 1673 and 3148.*

A wife's right to alimony constitutes such an interest in her husband's real estate as that she may take advantage of the *lis pendens* statute Code 1906, section 3148 to protect such interest. *Gallaspy's Sons Co. v. Massey*, 208.

4. *Divorce. Alimony. Lis pendens. Code 1906, section 1673.*

Where a wife files a bill for divorce from her husband and prays for alimony as provided in Code 1906, section 1673 and in her bill describes the real estate of her husband and asks that a lien be established thereon for the alimony allowed her, and at the same time has a notice put on the *lis pendens* docket of the county to the effect that she had instituted a suit for alimony involving this land, and afterwards a decree is rendered reciting that a lien was thereby established on the property described in the bill and previously

INDICTMENT—INJUNCTION.

HUSBAND AND WIFE—Continued.

placed on the *lis pendens* docket, she acquires a lien superior to a deed of trust executed by the husband alone after the filing of the *lis pendens* notice. *Ib.*

5. *Equity. Bill. Multifariousness. Partners. General demurrer. Code 1906, section 2517.*

Where a bill in chancery by the widow against the executor of her deceased husband charged that at the time of her marriage, her deceased husband was the manager of her plantation and that the plantation business and all other business conducted by her husband was a partnership business in which she equally shared and that all of the earnings of her husband comprising his entire estate were partnership property and owned jointly by her husband and herself in accordance with a partnership agreement between them, made after their marriage, that her husband made a will which she renounced. The prayer of the bill was for an accounting of all the business transactions had by the husband during the period of their married life, embracing numerous business enterprises in which her husband ventured in his own name and various partnerships and corporations in which her husband was interested, and that certificates of stock in such corporations held in the name of decedent, be declared partnership property and that an accounting be made of all expenditures and improvements and that the rights of the parties be fixed. *Held* that the bill was not multifarious. *Jones et al. v. Jones*, 600.

6. *Code 1906, section 2517. Disabilities of coverture. Partnership.*

Since under Code of 1906, section 2517, all of the disabilities of coverture have been removed, a married woman may lawfully enter into a partnership with her husband. *Ib.*

INDICTMENT.

See GRAND JURY.

INJUNCTION.

1. *Municipal corporations. Special counsel. Damages.*

A city or county may make a valid contract to employ associate counsel to assist its regularly retained counsel in any case where in the wisdom of the authorities it deems it necessary. *Water Works Co. v. Vicksburg*, 132.

INJURIES—INSTRUCTIONS.

INJUNCTION—Continued.

2. *Damages. Special counsel.*

Where a city employs additional counsel to dissolve an injunction against it, the injunction bond given to obtain such injunction can be made to respond in damages to any reasonable amount necessary to compensate the additional counsel so employed. *Water Works Co. v. Vicksburg*, 132.

3. *Action at law upon injunction bond. When brought.*

Until there has been a final determination of the suit in which the injunction bond was executed, no action at law can be maintained thereon, and this is true although the only relief sought by the bill of complaint was an injunction and the court had denied that relief, and dissolved the injunction after full proof, but did not dismiss the bill. *Ib.*

INJURIES.

1. *Proximate cause. Negligence.*

Where a defendant is negligent and his negligence combines with that of another, or with any other independent intervening cause, he is liable, although his negligence was not the sole negligence, or the sole proximate cause, and although his negligence without such other independent intervening cause would not have produced the injury. *Telephone Co. v. Woodham*, 318.

2. *Same.*

Negligence resulting in injury is the proximate cause thereof and creates liability therefor, where the negligence is of such a character that, by the usual course of events, some injury, not necessarily the particular injury, or injury received in the particular manner complained of, would result therefrom, provided the attendant circumstances are such that an ordinarily prudent man ought reasonably to have anticipated that some injury would probably result from the act done. *Ib.*

INSTRUCTIONS.

1. *Criminal law. Credibility of witnesses. Evidence.*

Where one of the witnesses for the state was employed as a detective to report "blind tigers," and testified that he was working for a salary and that the amount he was to receive did not depend upon the number of cases reported by him, but defendant proved that such witness had received one hundred dollars for nine cases of

INSTRUCTIONS.

INSTRUCTIONS—Continued.

detective work, and offered to introduce an account filed by the witness with the board of aldermen, upon which said amount was allowed. It was error for the court to refuse to allow this account to be introduced as this might have materially affected his credibility with the jury. *Pederee v. State*, 171.

2. *Weight of evidence.*

An instruction for the state is erroneous which tells the jury, "That they are not authorized under the law to disregard the testimony of the witness merely because he is employed as a detective, but they must give the testimony of such witness the same credence as that of any other witness, unless they believe from the testimony that such witness has knowingly and corruptly sworn falsely to a material fact in issue," as being upon the weight of evidence and the credibility of witnesses, which are matters peculiarly within the province of the jury, whose judgment should not be influenced by the views of the court in relation thereto. *Ib.*

3. *Confusing and misleading.*

The court should not give instructions which are confusing and misleading. *Hampton v. State*, 176.

4. *Same. Invading province of the jury. Code 1906, section 1136.*

In a prosecution for embezzlement an instruction that the mere failure on the part of defendant, without explanation, to turn over to his employer the funds in his hands belonging to it, established guilt, is erroneous, since under Code 1906, section 1136, the question whether such failure was sufficient to show guilt was for the jury. *Ib.*

5. *Criminal law. Witnesses. Impeachment. Contradictory statements.*

Where a witness for the state testified that he saw the accused commit the offense charged and denied on cross-examination that he had told another that whoever said witness knew who committed the offense falsified, it was error not to allow accused to show that witness had so stated, although witness admitted saying that he did not know anything about the offense. *Gables v. State*, 217.

6. *Credibility of witness.*

An instruction for the state is erroneous which charges the jury that "They are the sole judges of the evidence in the case and may believe one witness and disbelieve another on the ground of relationship of the witness to the defendant, or for any other reason satisfactory to the jury. *Ib.*

INSTRUCTIONS.

INSTRUCTIONS—Continued.

7. *Criminal law. Circumstantial evidence.*

In a case of circumstantial evidence, an instruction for the state that "circumstantial evidence may arise so high in the scale of belief as to generate full and complete conviction beyond a reasonable doubt of defendant's guilt; and if it does rise so high in the scale of belief as to generate full and complete conviction of defendant's guilt beyond a reasonable doubt in the minds of the jury, then they are authorized to act upon it and convict the defendant," is fatally erroneous in failing to add that such evidence should exclude every other reasonable hypothesis than that of defendant's guilt. *Miller v. State*, 226.

8. *Murder. Manslaughter.*

Where a defendant charged with murder is convicted of manslaughter he is presumed not to have been prejudiced by any instructions relating to the crime of murder. *Carter v. State*, 435.

9. *Peremptory. Jury.*

Where there is no issue of fact for the jury to try as to defendant's liability for damage the court should give a peremptory instruction for plaintiff as to liability. *Robinson v. City of Vicksburg*, 439.

10. *Prejudicial error.*

In a suit by an abutting property owner against a city for damages to his property caused by a change in the grade of a street where the liability of the city was unquestioned, it was prejudicial error to admit in evidence a petition, signed by plaintiff for the paving of the street in question and to refuse to instruct the jury to find for the plaintiff on the question of liability. *Ib.*

11. *Same.*

Such erroneous action of the court was calculated to cause the jury in determining both the question of liability and the quantity of damages to render a compromise verdict as to the latter. *Ib.*

12. *Criminal law. Circumstantial evidence.*

While it is true, that a conviction may be had on circumstantial evidence alone, when by it guilt is proven beyond a reasonable doubt, it is equally true that it must exclude every other reasonable hypothesis than that of guilt. *Permenter v. State*, 453.

13. *Trial. Improper argument.*

Where in the argument of a close case upon the facts, the counsel for plaintiff in commenting on the facts of defendant's failure to

INSTRUCTIONS.

INSTRUCTIONS—Continued.

produce certain witnesses on the stand said, over defendant's objection, that the fact that defendant had not brought certain witnesses raised the reasonable inference that defendant believed that if such witnesses were present they would testify in favor of plaintiff, and thereupon defendant asked an instruction that the jury could not presume that any person not present would testify against defendant and that defendant was no more bound to produce such witnesses than plaintiff. *Held*, that the refusal of this instruction and the refusal of the court to prevent the improper argument of counsel was reversible error. *Railroad v. Weinstein*, 515.

14. *Instructions.*

It is a mere matter of form that an instruction reads: "If the plaintiff has shown by the evidence," etc., instead of the usual way that, "If the jury believe from the evidence."

15. *Reference to pleadings. Error cured.*

An instruction that the jury will find a verdict for plaintiff if the evidence showed she was injured in the manner set out in the declaration, is error as tending to confuse and mislead the jury. *Southern Railway v. Gonong*, 540.

16. *Same.*

But where other instructions set out the facts necessary for the jury to believe in order to render a verdict and the declaration itself sets out such facts as that the jury could not be misled, such an instruction is harmless. *Ib.*

17. *Carrying concealed weapons. Pistol.*

In a prosecution for carrying a concealed weapon, it was not error for the court to grant an instruction for the state, "that if the defendant carried concealed in whole, or in part, a pistol which was defective, in that it did not have a mainspring or a hammer, the jury should find the defendant guilty as charged. *Mitchell v. State*, 579.

18. *Same.*

An object once a pistol does not cease to be one by becoming temporarily inefficient. *Ib.*

19. *Supreme court. Appeal. Motion for new trial. Recoupment. Trial.*

The general rule is that alleged errors of the trial court, occurring during the trial, will not be revised on appeal, unless such errors

INSTRUCTIONS.

INSTRUCTIONS—Continued.

have been called to the attention of the trial court in a motion for a new trial. *Hayes v. Liquor Co.*, 583.

20. *Same.*

Error in giving a peremptory instruction is analogous to a demurrer to the evidence and is reviewable on appeal, although no motion for a new trial was made in the trial court. *Ib.*

21. *Peremptory instructions.*

Where the evidence tends to establish a legal defense, a peremptory instruction should not be given against the defendant. *Ib.*

22. *Carrying concealed weapons. Burden of proof. Code 1906, section 1105.*

Any one indicted for carrying concealed a deadly weapon, under section 1105, Code 1906, can show as a defense, among other things, "that he was traveling and was not a tramp," but the same section provides: "And the burden of proving either of said defenses shall be on accused." An instruction which shifts this burden from the defendant to the state is erroneous. *City of Collins v. Fife*, 648.

23. *Criminal law. Weight of evidence.*

An instruction that, "if the jury believe that any witness has testified falsely in the case to any material matter, they have a right to reject all of the testimony of such witness, if they see proper," is erroneous in omitting the qualifying clause that the false swearing must have been intentionally and corruptly done. *Wofford v. State*, 759.

24. *Criminal law. Hearsay evidence. False pretenses.*

Where on the trial of accused for obtaining money under false pretenses by representing himself to be the agent of an adjusting company, the issue was whether or not he had been discharged by the company before the occurrence of the transaction complained of. It was error to allow the superintendent of agents of the company to testify that the books of the company showed that accused had been discharged several months before the date of the alleged offense, he having no personal knowledge of the fact, this testimony was hearsay. *Buford v. State*, 770.

25. *Evidence. Criminal intent. Good faith.*

Where accused was charged with obtaining money under false pretenses by contracting in the name of a company and obtaining money thereon and by representing himself as the agent of such

INSTRUCTIONS.

INSTRUCTIONS—Continued.

company and the issue was whether or not he had been previously discharged by the company. It was error for the court to refuse him an instruction that even though he was not in the employ of the company at the time of making the contract, but was ignorant of the fact that he had been discharged and acted in good faith in making the contract and obtaining the money, then he was not guilty of the crime charged. *Ib.*

26. *Criminal law. Murder.*

One convicted of manslaughter cannot complain of instructions on murder. *Tabor v. State*, 830.

27. *Nuncupative will. Construction. Presumption. Probate.*

A description in a will as "all my property" includes both real and personal property. *Caffey v. Tindall*, 851.

28. *Probate of nuncupative will.*

In a proceeding to probate an alleged nuncupative will which purported to devise "all" of the testator's property, it was error for the court to give an instruction to contestants that "the law presumes and in the absence of evidence to the contrary, conclusively presumes that the testator, if he was sane, knew that real estate would not pass under a nuncupative will." As the knowledge or want of knowledge on the part of the testator is a fact to be proven in the same manner that other facts are proven. *Ib.*

29. *Same.*

The law does presume, for some purposes, that all persons know the law; but not for the purpose of supplying evidence of a fact material to the controversy. *Ib.*

30. *Criminal law. Rape. Force.*

In the trial of a defendant charged with an assault with intent to rape it was reversible error for the court to give to the state the following instruction:

"The court charges the jury that in an assault with intent to commit rape, the force used may be only constructive; and the imposition of one hand upon the person of the female, though without intent to hurt, is in legal contemplation, the use of force, from which a criminal intent is presumed. Now if the jury believe from the evidence beyond a reasonable doubt that Will Corley imposed his hand on the person of Rebecca McDaniel, being a female of previous chaste character against her will, with intent to ravish her, and if the jury so believes beyond a reasonable doubt, then it is your duty to find the defendant guilty." *Corley v. State*, 896.

INSURANCE.

INSURANCE.

1. *Policy assignment.*

Where the insured shortly after obtaining a policy on his life, payable to his executors, administrators or assigns, pins a certificate to the policy making his father the sole beneficiary, but not intending to assign the policy to his father or change the beneficiary therein, except in such manner as would leave him the full control of the policy, and kept the policy in his own possession, such a certificate being revocable at his pleasure and testamentary in character and not executed with the formalities of a will is void. *White v. Rutcliff*, 93.

2. *Disposition of policy. Beneficiary. Consent.*

The right of the beneficiary named in a life insurance policy to the proceeds of the policy is absolute, that is to say, the rights to the benefits under the policy during the life of the contract, cannot be destroyed by the insured or disposed of, except with the consent of the beneficiary, and this applies whether the policy be an ordinary life policy or a policy to which is attached a loan value, cash surrender value and automatic paid up insurance. *Life Insurance Co. v. Willoughby*, 98.

3. *Same.*

Where the husband of the beneficiary in a policy procures a loan on the policy without the beneficiary's knowledge or consent and without ratification on her part, he is not her agent and she is not estopped by his acts. *Ib.*

4. *Limitation of liability. Regulation. Police power. Code 1906. Section 2575.*

The state under its police power has the right to regulate the business of insurance, and provide the kind and character of insurance contracts which may be made. *Assurance Co. v. Walker*, 404.

5. *Limitations of liability.*

A provision in an accident policy limiting the insurers liability to one-fifth of the amount of insurance unless notice of the accident be given to the insurance company within ten days thereafter is void as in contravention of Code 1906, section 2575, prohibiting stipulations in insurance policies limiting the bringing of suits. *Ib.*

6. *Same.*

Any contract of insurance which undertakes to relieve the insurance company from responsibility on its contracts by requiring any kind

INSURANCE.

INSURANCE—Continued.

of notice for less than the time required by the statute is in conflict with section 2575, Code 1906, and void. *Ib.*

7. *Total loss. Limitation of liability. Policy.*

Where the loss by fire is partial, but the injury by fire has rendered the building insured unfit for use for the purpose for which it was constructed and there are ordinances or there is a law prohibiting its reconstruction, the loss in such case is a total loss. *Insurance Co. v. Nunn*, 493.

8. *Code 1906, section 2592. Valued policy law.*

A provision in a fire insurance policy that the insurance company shall not be liable beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of building, is written out of the policy by the valued policy law under Code 1906, section 2592. *Ib.*

9. *Description of property. Parol evidence.*

Where by mistake the property insured under a fire insurance policy is described as being in section 11 instead of section 2, this is immaterial where there is sufficient left in the policy after rejecting the erroneous description to identify the situation of the property insured, although the policy provides that it shall be void if the insured has misrepresented any material fact concerning the subject-matter. *Shivers v. Fire Insurance Co.*, 744.

10. *Construction of policy.*

Fire policies will be construed most strongly in favor of the insured, the policy should be constructed, if practicable, so as to cover the subject matter intended to be covered and a portion of the description which is false may be disregarded if enough remains to identify the property. *Ib.*

11. *Parol evidence. Intention. Admissibility.*

Parol evidence is not admissible to so extend the terms of the policy as to cover property not intended in the description, but it may be received for the purpose of applying the description to the property intended to be described. *Ib.*

12. *Certificate. By-laws. Presumption.*

Where a certificate issued to a member in a mutual benefit association provides that "any failure to comply strictly with the laws and regulations of the order as prescribed by its grand lodge, causes

JUDGMENT AND DECREE.

INSURANCE—Continued.

forfeiture of the membership represented by this certificate." This provision in the contract does not at all expressly provide that the member should be bound by all by-laws and regulations then in force or thereafter to be enacted. *Benefit Association v. Hoskins*, 812.

13. *By-laws. Presumption.*

There is no presumption that by-laws shown to have been enacted after the certificate of membership was issued were in force when such certificate was issued and in the absence of any provision in the certificate that the member should be bound by subsequent enacted laws, he is not affected by such laws. *Ib.*

JUDGMENT AND DECREE.

1. *Criminal law. Code 1906, section 1016.*

Section 1016, Code 1906, providing for correction of errors in judgments applies only to civil not to criminal cases. *Wilson v. Town of Hantsboro*, 252.

2. *Same.*

This section refers alone to corrections of mistake in "miscalculation or misrecital of any sum of money or quantity of anything, or any name" and is not applicable to a case where the effort is to entirely change the judgment incorrectly entered on the minutes by the misprision of the clerk, to a totally different judgment which had been actually rendered by the court. The power to do this is not derivable, either in civil or criminal cases from this section. *Ib.*

3. *Power to correct.*

Power to correct a judgment rendered at a former term, not in some clerical matter merely, as to name or amount, but so as to strike out a judgment erroneously entered by mistake of the clerk, and substitute for it the wholly different judgment actually rendered by the court is a power inherent in every court of record and not derived from any statute. *Ib.*

4. *Correction. Evidence.*

On a motion to correct an erroneously entered judgment, any evidence of parol, or other kind, is competent, which throws material light on the truth of the matter, but where there is nothing but mere parol evidence, such evidence should be very carefully and closely scrutinized. *Ib.*

JUDGMENT LIEN—JURISDICTION.

JUDGMENT AND DECREE—Continued.

5. *Void decree. How attacked.*

A void decree of the court may be attacked anywhere either collaterally or directly. *Alexander v. Herring*, 427.

6. *Foreign judgment. Certification. Evidence. Attachment. Code 1906, section 171.*

A judgment recovered in another state cannot be proved or admitted in the courts of this state as evidence of the fact, until there has been a compliance with section 905 of the Revised Statutes of the United States. *McLin & Co. v. Worden*, 547.

7. *Section 171, Code 1906. Attachment.*

Under section 171, Code 1906, a defendant is entitled to have his damages assessed for the wrongful suing out of a writ of attachment, if the question of indebtedness be decided in his favor, although the grounds upon which the attachment was sued out were not contested by him and is not compelled to bring a new and independent suit on the bond. *Ib.*

JUDGMENT LIEN.

1. *Enrollment. Constructive notice. Bona fide purchaser.*

A *bona fide* purchaser for value without actual notice is entitled to the full protection afforded by the law to such purchaser. *Stone v. Thrufoot Bros. & Co.*, 15.

2. *Same.*

The enrollment of a judgment against "the City News Company," composed of L. G. W., is not constructive notice to a third person that L. W. is the same person as L. G. W., and property purchased by the third person from the wife of L. W. after she acquired it from him is not subject to the judgment, the purchaser being a *bona fide* purchaser without notice. *Ib.*

JURISDICTION.

1. *Garnishment. Situs of debt.*

If the garnishee be found in this state and process be personally served upon him therein, the court acquires jurisdiction over him, and can garnish the debt due from him to the debtor of plaintiff, and condemn it, provided the garnishee could himself be sued by

JUROR AND JURY.

JURISDICTION—Continued.

his creditors in this state, regardless of the original situs of the debt outside of the state. *Railroad Co. v. Lyon*, 186.

2. *Justice of the peace. Amount in controversy. Code 1906, § 2723.*

Under Code 1906, § 2723, providing that "justices of the peace shall have jurisdiction of all actions for the recovery of debts or damages or personal property, where the principal of the debt, the amount of the demand, or the value of the property sought to be recovered, shall not exceed two hundred dollars," where the plaintiff honestly believes and contends for the recovery of a sum above the jurisdiction of a justice of the peace, the circuit court has a right to entertain jurisdiction because in such case the amount demanded is the real amount in controversy between the parties and this fixes the jurisdiction. *Railroad v. Hitt & Rutherford*, 679.

3. *Same.*

But where there is no uncertainty as to how much the plaintiff seeks to recover, it can make no difference what amount is claimed in the declaration, if in truth, there is no real demand for a sum sufficient to give the circuit court jurisdiction. *Ib.*

JUROR AND JURY.

1. *Conflicting evidence.*

Where the evidence on a material issue is conflicting, it is a question for the jury. *Byers v. McDonald*, 42. -

2. *Criminal law. Homicide. Dying declarations. Admissibility. Conduct of judge.*

The jury, when it retires to consider its verdict, should be left absolutely free from any and all outside influence so that it may consider the case submitted to them with perfect freedom. *Wiltcher v. State*, 374.

3. *Same.*

Where the jury retired to consider of their verdict between seven thirty and eight o'clock Friday evening and on the following Saturday evening sent a note to the judge, through the bailiff, "asking permission to take a walk on Sunday morning and evening," and saying that they were hopelessly hung, and the judge sent them word by the bailiff that "he would receive a verdict, if it was brought in by nine o'clock, but if not, he was going to Hazlehurst

JUROR AND JURY.

JUROR AND JURY—Continued.

and would not be back until Monday morning," and that he would not receive a verdict on Sunday, and further gave the jury permission to take a walk on Sunday morning and evening; and the jury reached a verdict about nine o'clock Saturday night. *Held*, that the message of the judge was not an improper communication to the jury and had no tendency to coerce them into a verdict. *Ib*.

4. *Peremptory instruction.*

Where there is no issue of fact for the jury to try as to defendant's liability for damage the court should give a peremptory instruction for plaintiff as to liability. *Robinson v. City of Vicksburg*, 439.

5. *Prejudicial error. Instructions.*

In a suit by an abutting property owner against a city for damages to his property caused by a change in the grade of a street where the liability of the city was unquestioned, it was prejudicial error to admit in evidence a petition, signed by plaintiff for the paving of the street in question and to refuse to instruct the jury to find for the plaintiff on the question of liability. *Ib*.

6. *Same.*

Such erroneous action of the court was calculated to cause the jury in determining both the question of liability and the quantity of damages to render a compromise verdict as to the latter. *Ib*.

7. *Question for the jury.*

Where the facts are conceded, but the inferences in regard to negligence is doubtful, depending upon the general knowledge and experience of men, it is a question for the jury. *Southern Ry. Co. v. Floyd*, 519.

8. *Constitutional law. Acts 1910, chapter 135. Presumptions. Constitution 1890, article 6.*

A statute cannot confer judicial power upon a jury, as to do so would be violative of article 6 of the Constitution of 1890, under which all judicial power in the state is vested in the supreme court, and the circuit and chancery courts and the courts of justices of the peace and such other inferior courts as the legislature may from time to time establish. *N. & S. R. R. Co. v. Crauford*, 697.

9. *Acts 1910, chapter 135.*

Section 2 of chapter 135, acts 1910, declaring that "questions of negligence and contributory negligence shall be for the jury to determine"

JUSTICE OF THE PEACE.

JUROR AND JURY—Continued.

is merely declaratory of the common law. There can be no question of negligence or contributory negligence for the jury, except issue of fact. The court alone has the power to determine the legal sufficiency as tending to establish negligence or contributory negligence. If the negligence never reaches the point of raising an issue of fact to be determined, then there is no question for the jury, and the court should instruct peremptorily. *N. & S. R. R. Co. v. Crawford*, 697.

10. *Same*.

The only change made in the common law by this statute is that in the class of actions referred to in section 1, contributory negligence on the part of the plaintiff is no longer a bar to recovery, but may be used against him by the defendant in mitigation of damages. *Ib*.

JUSTICE OF THE PEACE.

1. *Jurisdiction. Situs of debt.*

If the garnishee be found in this state and process be personally served upon him therein, the court acquires jurisdiction over him, and can garnish the debt due from him to the debtor of plaintiff, and condemn it, provided the garnishee could himself be sued by his creditors in this state, regardless of the original situs of the debt outside of the state. *Railroad Co. v. Lyon*, 186.

2. *Petition for appeal. Certificate of justice of peace. Contradiction of certificate.*

Where a municipality filed a petition for appeal from a justice court and the justice certified at the bottom of such petition that the same had been filed and appeal granted as of a certain date, the justice will not be permitted to impeach his own certificate. *Town of Purvis v. S. E. Rees*, 636.

3. *Jurisdiction. Amount in controversy. Code 1906, section 2723.*

Under Code 1906, § 2723, providing that "justices of the peace shall have jurisdiction of all actions for the recovery of debts or damages or personal property, where the principal of the debt, the amount of the demand, or the value of the property sought to be recovered, shall not exceed two hundred dollars," where the plaintiff honestly believes and contends for the recovery of a sum above the jurisdiction of a justice of the peace, the circuit court has a right to entertain jurisdiction because in such case the amount demanded is the

LANDLORD AND TENANT.

JUSTICE OF THE PEACE—Continued.

real amount in controversy between the parties and this fixes the jurisdiction. *Railroad v. Hitt & Rutherford*, 679.

4. *Same.*

But where there is no uncertainty as to how much the plaintiff seeks to recover, it can make no difference what amount is claimed in the declaration, if in truth, there is no real demand for a sum sufficient to give the circuit court jurisdiction. *Ib.*

5. *Fees. Code 1906, section 2182, paragraph V.*

Under paragraph V, section 2182, Code 1906, providing that justice of the peace shall receive "for services as conservators of the peace and for examination of cases of persons charged with felony, to be paid out of the county treasury on the allowance of the board of supervisors, on a detailed fee-bill in each case, annually a sum not exceeding fifty dollars." *Held*, that a justice of the peace cannot charge a lump sum for services as conservator of the peace and can only recover for the fees actually earned, as shown by a detailed fee-bill, and each item charged in such detailed fee-bill must be specifically authorized by some statute. *Connerly v. Lincoln County*, 731.

6. *Same.*

Under this statute a justice of the peace can never recover more than fifty dollars in any one year and his fees may amount to much less. *Ib.*

LANDLORD AND TENANT.

1. *Rent and supplies. Estoppel. Agent.*

Where a tenant sells cotton raised on the leased premises with the landlord's consent and the purchaser pays part of the proceeds to the landlord for his rent and the balance to the tenant and the landlord fails to disclose to the purchaser when he is paid the rent that he has also a claim for supplies, he is estopped from afterwards asserting his claim for supplies against the purchaser. *Seavey and Sons v. Godbold*, 113.

2. *Same.*

In such case the tenant is the agent of the landlord to make the sale of the cotton and if he fails to account for the proceeds of the sale the purchaser cannot be made to suffer on account thereof. *Ib.*

 LAWS CONSTRUED—LIABILITY.

LAWS (OTHER THAN CODE SECTIONS) CONSTRUED.

- 1906, ch. 132. Drainage district. Petition to establish. Sufficiency. Bonds. Interest. *Haley v. Drainage Commissioners*, 556.
- 1908, ch. 100. Fraudulent conveyance. Sale in bulk. Presumptions. Evidence. *Dry Goods Co. v. Rowe & Carithers*, 30.
- 1908, ch. 119, p. 124. Telegraphs and telephones. Regulations. Charges. Statutory law. Common carrier. *Telephone Co. v. State*, 1.
- 1910, c. 99. State bonds. Interest. Sale. Par value. *Smith v. State*, 850.
- 1910, ch. 135, § 2. Contributory negligence. Jury. *N. & S. R. R. Co. v. Crawford*, 697.
- 1910, ch. 135. Constitutional law. Equal protection. Classification. *N. & S. R. R. Co. v. Crawford*, 697.

LIABILITY.

1. *Common carriers. Personal injuries. Carrying passengers beyond station.*

If in the absence of some good reason, it is the duty of common carriers to allow passengers to get off at the proper depot and a failure to do so entitles the passenger to recover at least nominal damages. *Railroad Co. v. Lambert*, 310.

2. *Same.*

If in any case it is necessary for a passenger train to be pulled away beyond the depot and into its yards, it is the duty of the company to notify passengers of its purpose to return them to their proper landing place and if it fails to do so, it is negligence, and any damages occasioned any passenger as the direct result makes the company liable therefor. *Ib.*

3. *Carriers. Personal injuries. Proximate cause.*

A passenger was carried by her station for about three hundred yards, where the train stopped in the railroad yard, without any notice of the purpose to return to the station, and the passenger voluntarily alighted a few minutes thereafter without any request to be carried back to the station and walked back to the station through the rain, where she waited four hours for a train which she was to take on another road and by getting wet in walking back to the depot caught a severe cold. The train which carried her by the depot backed into the station, in about twenty or thirty

LIABILITY.

LIABILITY—Continued.

minutes after the passenger had alighted, for the purpose of allowing passengers to alight. *Held*, that the running of the train beyond the station was not the proximate cause of any injury and that the passenger was only entitled to recover nominal damages. *Ib.*

4. *Breach of warranty. Remedy. Declarations. Essentials. Purchase of outstanding title.*

While in order to sustain the technical action of covenant for a breach of general warranty, there must be either an actual eviction by judicial process, or a surrender of possession to a valid, subsisting, paramount, legal title, asserted against the covenantee, or that there must be a holding of the grantee out of possession by such title, so that he could not enter, yet there are two other remedies that the covenantee may invoke without waiting for eviction or surrender of the premises. These other two actions are *assumpsit*, or *suit in chancery*. *Coopwood v. McCandless*, 364.

5. *Covenants of warranty. Purchase of outstanding title.*

In every case where the covenantee purchases an outstanding paramount title, or pays an incumbrance, he assumes the risk of judging correctly as to the character and validity of the incumbrance or title which he buys. He must establish as a condition precedent to recovery, either at law or in equity, that it was a paramount lien or title against which the warrantor was bound to defend him; and that he acted under a necessity to save the estate. *Ib.*

6. *Insurance. Regulation. Police power. Code 1906, section 2575.*

The state under its police power has the right to regulate the business of insurance, and provide the kind and character of insurance contracts which may be made. *Assurance Co. v. Walker*, 404.

7. *Insurance.*

A provision in an accident policy limiting the insurers liability to one-fifth of the amount of insurance unless notice of the accident be given to the insurance company within ten days thereafter is void as in contravention of Code 1906, section 2575, prohibiting stipulations in insurance policies limiting the bringing of suits. *Assurance Co. v. Walker*, 404.

8. *Same.*

Any contract of insurance which undertakes to relieve the insurance company from responsibility on its contracts by requiring any kind

 LIEN—LIS PENDENS.

LIABILITY—Continued.

of notice for less than the time required by the statute is in conflict with section 2575, Code 1906, and void. *Assurance Co. v. Walker*, 404.

9. *Fire insurance. Total loss. Limitation. Policy.*

Where the loss by fire is partial, but the injury by fire has rendered the building insured unfit for use for the purpose for which it was constructed and there are ordinances or there is a law prohibiting its reconstruction, the loss in such case is a total loss. *Insurance Co. v. Nunn*, 493.

10. *Code 1906, section 2592. Valued policy law.*

A provision in a fire insurance policy that the insurance company shall not be liable beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of building, is written out of the policy by the valued policy law under Code 1906, section 2592. *Ib.*

LIEN.

1. *Wages of overseers. Code 1906, section 3042.*

Where an overseer is hired by the year and wrongfully discharged before the termination of his contract under Code 1906, section 342, giving a lien on crops to overseer, etc., he has a lien for his wages already earned and those he would have earned until the expiration of his contract less any earnings after his discharge. *Langford v. Leggitt*, 266.

2. *Same.*

And this is true even though at the time of the overseer's discharge he owed his employer more than the wages due at that time. *Ib.*

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

LIS PENDENS.

1. *Husband and wife. Divorce and alimony. Code 1906, sections 1673 and 3148.*

A wife's right to alimony constitutes such an interest in her husband's real estate as that she may take advantage of the *lis pendens* statute

MASTER AND SERVANT.

LIS PENDENS—Continued.

Code 1906, section 3148 to protect such interest. *Gallaspy's Sons Co. v. Massey*, 208.

2. *Divorce. Alimony. Code 1906, section 1673.*

Where a wife files a bill for divorce from her husband and prays for alimony as provided in Code 1906, section 1673 and in her bill describes the real estate of her husband and asks that a lien be established thereon for the alimony allowed her, and at the same time has a notice put on the *lis pendens* docket of the county to the effect that she had instituted a suit for alimony involving this land, and afterwards a decree is rendered reciting that a lien was thereby established on the property described in the bill and previously placed on the *lis pendens* docket, she acquires a lien superior to a deed of trust executed by the husband alone after the filing of the *lis pendens* notice. *Ib.*

MASTER AND SERVANT.

1. *Carriers. Passengers. Evidence.*

Where deceased in company with another got upon the platform of a passenger train of appellant about ten o'clock at night, intending to ride a distance of about a mile, the fare being five cents and the conductor did not see these two parties on the platform, nor did they offer to pay fare, though the companion of deceased testified that they were ready and willing to pay same and expected to do so when the conductor should ask them. Whether under these circumstances decedent was a passenger was a question for the jury. *Railroad Co. v. Sanderson*, 148.

2. *Same. Conductors.*

The general rule that a master is not responsible for acts done by the servant outside the line of his duty and not in the service of the master, has no application to a case where a railroad passenger conductor, the *alter ego* of the company, himself inflicts the injury on the passenger. *Ib.*

3. *Assumption of risk. Damages.*

Where a declaration alleges that defendant was master and plaintiff his servant, and that defendant owed plaintiff the duty to furnish him a safe place to work, that it was plaintiff's duty to look after a seed conveyor, a dangerous piece of machinery, which it was defendant's duty to guard; that it consisted of a spiral screw revolving

MUNICIPAL CORPORATIONS.

MASTER AND SERVANT—Continued.

near the floor, around which cotton seed was dumped to be carried by the screw to another department; that plaintiff's duty was to see that the screw was not clogged and that in doing so he had to pass along and step over the screw, and that defendant knew that the screw was dangerous and required a guard, but failed to guard it, and while plaintiff was attending to the conveyor, the seed having been dumped on the end of it, struck plaintiff's leg and knocked it against the screw injuring him, and further alleging that had defendant protected the screw, plaintiff would not have been injured, and that defendant was negligent in not guarding it, and that such negligence was the proximate cause of the injury. *Held*, that the declaration stated sufficient facts to constitute a cause of action against the defendant. *Knox v. Cotton Oil Co.*, 880.

4. *Same.*

Such a declaration was not demurrable on the ground that it showed that the danger from the unguarded screw was obvious and that plaintiff assumed the risk, nor because it did not allege that the seed were dumped against plaintiff by defendant or that defendant had failed in any duty in that respect. *Ib.*

MUNICIPAL CORPORATIONS.

1. *Special counsel. Injunction. Damages.*

A city or county may make a valid contract to employ associate counsel to assist its regularly retained counsel in any case where in the wisdom of the authorities it deems it necessary. *Water Works Co. v. Vicksburg*, 132.

2. *Injunction. Damages. Special counsel.*

Where a city employs additional counsel to dissolve an injunction against it, the injunction bond given to obtain such injunction can be made to respond in damages to any reasonable amount necessary to compensate the additional counsel so employed. *Ib.*

3. *Supplying water outside of corporate limits. Powers. Code 1906, municipal chapter.*

Municipalities have no powers, except such as are delegated to them by the state, either expressly or by necessary implication; and there is no distinction in this respect between governmental powers and those of a private or business nature. *Steitenroth v. City of Jackson*, 354.

NEGLIGENCE.

MUNICIPAL CORPORATIONS—Continued.

4. *Supplying water to persons outside corporate limits.*

Under the municipal chapter, Code 1906, municipalities have no power to supply water to persons living outside of the municipality and it cannot be said that such power results by necessary implication from the power given the municipality to supply its own citizens with water. *Ib.*

5. *Dedication. Acceptance.*

Where the owner made a survey of his land, laying it off into blocks, lots, streets and avenues and later sold the blocks and lots with reference to such streets and avenues, and afterwards the corporate limits of the city were extended so as to include said land, and the city assessed the blocks and lots of this addition for taxation, but not the streets and avenues, and the city worked a portion of the streets shown on such addition but not the particular street upon which the accident occurred. *Held*, that, these facts constitute a dedication to and an acceptance by the city of the dedication to public use of the streets and avenues of such addition and renders the city liable for damages occasioned by its failure to keep up and repair such streets and avenues. *City of Jackson v. Laird*, 476.

NEGLIGENCE.

1. *Injuries. Proximate cause.*

Where a defendant is negligent and his negligence combines with that of another, or with any other independent intervening cause, he is liable, although his negligence was not the sole negligence, or the sole proximate cause, and although his negligence without such other independent intervening cause would not have produced the injury. *Telephone Co. v. Woodham*, 318.

2. *Same.*

Negligence resulting in injury is the proximate cause thereof and creates liability therefor, where the negligence is of such a character that, by the usual course of events, some injury, not necessarily the particular injury, or injury received in the particular manner complained of, would result therefrom, provided the attendant circumstances are such that an ordinarily prudent man ought reasonably to have anticipated that some injury would probably result from the act done. *Ib.*

NEGLIGENCE.

NEGLIGENCE—Continued.

3. *Actions. Proof. Variance. Personal injury. Damages. Code 1906, section 1985.*

In an action for damages for personal injuries where the declaration charges gross negligence and intentional wrong, the plaintiff may recover actual damages where only negligence is shown as the allegation of gross negligence includes negligence, the greater including the less. *Hollingshed v. Y. & M. V. R. R. Co.*, 464.

4. *Want of ordinary care. Actual damages. Physical and mental suffering.*

In an action for personal injury where the evidence shows that the injury complained of was the result of a want of ordinary care alone on the part of defendant, the plaintiff should recover not only for medical bills and loss of time, but also for physical pain, and mental suffering as the result thereof, as these are all elements of actual damages. *Ib.*

5. *Code 1906, section 1985.*

Code 1906, section 1985, providing that "proof of injury inflicted by the running of the locomotives and cars," shall make out a *prima facie* case of negligence is applicable as well where a crowd of witnesses see the injury as where the manner of the injury inflicted is not known to others than the employees of the railroad. *Ib.*

6. *Railroads. Blocking highway. Proximate cause.*

When the facts of a given case are undisputed and the inferences or conclusion to be drawn therefrom are indisputable, when the standard of duty is fixed and defined so that a failure to attain it, is negligence beyond cavil, then contributory negligence is a matter of law. *Southern Ry. Co. v. Floyd*, 519.

7. *Proximate cause of injury. Last clear chance.*

If the sole immediate cause of the injury was the defendant's negligence, the plaintiff can recover, notwithstanding previous negligence of his own. *Ib.*

8. *Contributory negligence.*

Where plaintiff on his way home at night found the public road blocked by freight cars standing on the railroad tracks that passed over the public road, the cars extending about fifty feet on either side of the crossing and having no engine attached thereto, the cars remaining there all night and a part of next day: And plaintiff dismounted from his horse and went around one end of the cars

NEGLIGENCE.

NEGLIGENCE—Continued.

to get into the road on the other side and in going around, just before he got back into the public road fell into a hole and was injured. His act in so doing was not contributory negligence *per se*. *Ib.*

9. *Question for the jury.*

Where the facts are conceded, but the inferences in regard to negligence is doubtful, depending upon the general knowledge and experience of men, it is a question for the jury. *Ib.*

10. *Proximate cause.*

Where the injury to plaintiff was directly traceable to the negligent obstruction of a highway by the defendant railroad company such obstruction was the proximate cause of the injury. *Ib.*

11. *Carriers. Local freight trains. Passengers.*

A regular local freight train, equipped with the ordinary appliances and conveniences of a local freight train, except that the car attached to it for the use of passengers was what is known as a "way car" with compartments for passengers, baggage, trainmen and tools used in connection with the operation of a local freight train, is neither a regular passenger train, nor a "mixed or accommodation train" within Code 1906, section 4054, limiting the liability of carriers for injuries to passengers. *White v. I. C. R. R. Co.*, 651.

12. *Passengers. Carriers. Common law duty.*

At common law there is only one class of trains in the operation of which the carrier is relieved from the exercise of the utmost degree of care for the safety of passengers on such trains and that is those trains which are not intended for and do not carry passengers. *Ib.*

13. *Same.*

In case of injury to persons riding on such trains, the carrier is not liable unless such injury is caused by its willful or intentional wrong or gross negligence as persons riding on such trains contrary to the rules of the carrier are trespassers and even when riding by permission of the trainman in charge of such trains are bare licensees. *Ib.*

NEW TRIAL—PARTNERSHIP.

NEW TRIAL.

1. *Criminal law. Cumulative evidence. Corroborative evidence.*

It is the general rule that courts will grant with great reluctance, new trials founded on newly discovered evidence, especially when such evidence is merely cumulative, but where the newly discovered evidence is corroborative, the rule is not enforced with the same strictness as where it is merely cumulative. *Williams v. State*, 274.

2. *Cumulative evidence. Corroborative evidence.*

Cumulative evidence is evidence of the same kind as that already given to the same point. Evidence establishing the disputed fact by other circumstances than those shown on the trial is corroborative evidence and when newly discovered authorizes a new trial. *Ib.*

3. *Rape. Newly discovered evidence.*

Where on a trial for rape of a child under twelve years of age the age of the child was left in doubt by the evidence and it appears from newly discovered evidence that such doubt would probably be removed, a new trial should be granted on this ground. *Ib.*

4. *Supreme court. Appeal. Recoupment. Peremptory instruction.*

The general rule is that alleged errors of the trial court, occurring during the trial, will not be revised on appeal, unless such errors have been called to the attention of the trial court in a motion for a new trial. *Hayes v. Liquor Co.*, 583.

5. *Same.*

Error in giving a peremptory instruction is analogous to a demurrer to the evidence and is reviewable on appeal, although no motion for a new trial was made in the trial court. *Ib.*

PARTNERSHIP.

1. *Equity. Bill. Multifariousness. Husband and wife. General demurrer. Code 1906, section 2517.*

Where a bill in chancery by the widow against the executor of her deceased husband charged that at the time of her marriage, her deceased husband was the manager of her plantation and that the plantation business and all other business conducted by her husband was a partnership business in which she equally shared and that all of the earnings of her husband comprising his entire estate were

PASSENGERS—PLEADING.

PARTNERSHIP—Continued.

partnership property and owned jointly by her husband and herself in accordance with a partnership agreement between them, made after their marriage; that her husband made a will which she renounced. The prayer of the bill was for an accounting of all the business transactions had by the husband during the period of their married life, embracing numerous business enterprises in which her husband ventured in his own name and various partnerships and corporations in which her husband was interested, and that certificates of stock in such corporations held in the name of decedent, be declared partnership property and that an accounting be made of all expenditures and improvements and that the rights of the parties be fixed. *Held* that the bill was not multifarious. *Jones et al. v. Jones*, 600.

2. *Code 1906, section 2517. Disabilities of coverture.*

Since under Code of 1906, section 2517, all of the disabilities of coverture have been removed, a married woman may lawfully enter into a partnership with her husband. *Id.*

PASSENGERS.

See CARRIERS.

PLEADING.

1. *Construction of railroad. Independent contractor. Abutting owner. Damages.*

Where a railroad is constructed by an independent contractor according to plans and specifications furnished by the chief engineer of the railroad, and injury results not from negligence in the doing of the work by the independent contractor, but from the doing of the work at all, as illegal or as constituting, when done, a nuisance, the railroad company is liable for damages. *Railroad Co. v. Holden*, 124.

2. *Construction of railroad. Damages.*

Where an abutting owner sues a railroad company for damages and charges in his declaration that his damages were caused by the construction of the railroad by an independent contractor who had contracted with the railroad to construct such road according to plans and specifications of the chief engineer of the railroad company and that when completed the contractor turned the railroad over to defendant and the same was accepted by it. A special plea,

PRESUMPTIONS—PRINCIPAL AND AGENT.

PLEADING—Continued.

that defendant was not responsible because, at the time of the injury, it had nothing to do with the railroad so constructed, the work having been done by an independent contractor and that the railroad company did not acquire the line until after the damage had been completed, was demurrable, because such plea does not deny the allegations of the declaration that the construction company was to construct the road according to the plans and specifications furnished it by the chief engineer of the defendant railroad company, nor allege that it was the way the construction company performed its work and not the performance of the work itself, which caused the injury. *Railroad Co. v. Holden*, 124.

3. *Replication. Waiver.*

A defendant waives the failure of the plaintiff to formally deny the matter alleged in his special pleas by not moving for a judgment before the introduction of the evidence begins. *Kinney v. M. J. & K. C. R. R. Co.*, 795.

PRESUMPTIONS.

1. *Escheat. Required proof. Survivorship of heirs.*

In an action of escheat the state must recover if at all upon the strength of its own title and not the weakness of that of the defendant. *State ex rel. v. Williams*, 293.

2. *Presumptions.*

The presumption of law that a person dying intestate has left heirs capable of inheriting his estate is one of the strongest presumptions known to law, because the presumption itself runs with the usual current of nature. *Ib.*

3. *Same.*

This presumption can only be overcome by positive proof of the want of persons capable of taking the estate under the laws of descent and distribution. *Ib.*

PRINCIPAL AND AGENT.

1. *Landlord and tenant. Rent and supplies. Estoppel.*

Where a tenant sells cotton raised on the leased premises with the landlord's consent and the purchaser pays part of the proceeds to the landlord for his rent and the balance to the tenant and the

PROMISSORY NOTES—PUBLIC RECORDS.

PRINCIPAL AND AGENT—Continued.

landlord fails to disclose to the purchaser when he is paid the rent that he has also a claim for supplies, he is estopped from afterwards asserting his claim for supplies against the purchaser. *Seavey and Sons v. Godbold*, 113.

2. *Same.*

In such case the tenant is the agent of the landlord to make the sale of the cotton and if he fails to account for the proceeds of the sale the purchaser cannot be made to suffer on account thereof. *Ib.*

3. *Collection of note.*

Where the maker contracted to pay his note at a bank in Memphis, and the payee without consideration and for the convenience of the maker and at his request, forwarded the note for collection to a bank at the home of the maker, the latter bank was the agent of the maker and not of the payee and a payment to it did not discharge the note until the funds were transmitted to the payee. *Chemical Co. v. Steen*, 504.

4. *Same.*

Where one of two parties must suffer a loss from the act of an unfaithful agent, it is proper that that party should be the loser who for the purpose alone of serving his own ends, was the cause of the selection of the unfaithful agent. *Ib.*

PROMISSORY NOTES.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES.*

PUBLIC RECORDS.

1. *Forgery. Cancellation of deed of trust. Indictment. Code 1906, § 1177.*

To justify a conviction of falsifying a record under Code 1906, § 1177, by entering a false satisfaction on the margin of the record of a trust deed, it must be charged in the indictment that the cancellation of the deed of trust by marginal entry on the record was attested by the chancery clerk and that this was done and must be proven on the trial. *Poythress v. State*, 805.

2. *Same.*

The attestation of the clerk was necessary to give the cancellation legal efficacy or validity. *Ib.*

RAILROADS.

RAILROADS.

1. *Independent contractor. Abutting owner. Damages. Pleading.*

Where a railroad is constructed by an independent contractor according to plans and specifications furnished by the chief engineer of the railroad, and injury results not from negligence in the doing of the work by the independent contractor, but from the doing of the work at all, as illegal or as constituting, when done, a nuisance, the railroad company is liable for damages. *Railroad Co. v. Holden*, 124.

2. *Same. Amount.*

Where the suit by the abutting property owner was for five thousand dollars damages for injuries to his property by the construction of the railroad, and there was evidence that the property before such construction was worth twenty-five hundred dollars and that the property was greatly damaged in respect to ingress and egress to, and from the property and by reason of cinders, smoke and vibrations, a verdict for three hundred dollars is not excessive. *Ib.*

3. *Pleading. Damages.*

Where an abutting owner sues a railroad company for damages and charges in his declaration that his damages were caused by the construction of the railroad by an independent contractor who had contracted with the railroad to construct such road according to plans and specifications of the chief engineer of the railroad company and that when completed the contractor turned the railroad over to defendant and the same was accepted by it. A special plea, that defendant was not responsible because, at the time of the injury, it had nothing to do with the railroad so constructed, the work having been done by an independent contractor and that the railroad company did not acquire the line until after the damage had been completed, was demurrable, because such plea does not deny the allegations of the declaration that the construction company was to construct the road according to the plans and specifications furnished it by the chief engineer of the defendant railroad company, nor allege that it was the way the construction company performed its work and not the performance of the work itself, which caused the injury. *Ib.*

4. *Negligence. Blocking highway. Proximate cause.*

When the facts of a given case are undisputed and the inferences or conclusion to be drawn therefrom are indisputable, when the standard of duty is fixed and defined so that a failure to attain it, is negligence beyond cavil, then contributory negligence is a matter of law. *Southern Ry. Co. v. Floyd*, 519.

RAPE.

RAILROADS—Continued.

5. *Proximate cause of injury. Last clear chance.*

If the sole immediate cause of the injury was the defendant's negligence, the plaintiff can recover, notwithstanding previous negligence of his own. *Ib.*

6. *Contributory negligence.*

Where plaintiff on his way home at night found the public road blocked by freight cars standing on the railroad track that passed over the public road, the cars extending about fifty feet on either side of the crossing and having no engine attached thereto, the cars remaining there all night and a part of next day: And plaintiff dismounted from his horse and went around one end of the cars to get into the road on the other side and in going around, just before he got back into the public road fell into a hole and was injured. His act in so doing was not contributory negligence *per se*. *Ib.*

7. *Question for the jury.*

Where the facts are conceded, but the inferences in regard to negligence is doubtful, depending upon the general knowledge and experience of men, it is a question for the jury. *Ib.*

8. *Proximate cause.*

Where the injury to plaintiff was directly traceable to the negligent obstruction of a highway by the defendant railroad company such obstruction was the proximate cause of the injury. *Ib.*

RAPE.

1. *Newly discovered evidence.*

Where on a trial for rape of a child under twelve years of age the age of the child was left in doubt by the evidence and it appears from newly discovered evidence that such doubt would probably be removed, a new trial should be granted on this ground. *Williams v. State*, 274.

2. *Force. Instructions.*

On the trial of a defendant charged with an assault with intent to rape it was reversible error for the court to give to the state the following instruction:

"The court charges the jury that in an assault with intent to commit rape, the force used may be only constructive; and the imposition

RECOUPMENT—REPLEVIN.

RAPE—Continued.

of one hand upon the person of the female, though without intent to hurt, is in legal contemplation, the use of force, from which a criminal intent is presumed. Now if the jury believe from the evidence beyond a reasonable doubt that Will Corley imposed his hand on the person of Rebecca McDaniel, being a female of previous chaste character against her will, with intent to ravish her, and if the jury so believes beyond a reasonable doubt, then it is your duty to find the defendant guilty." *Corley v. State*, 896.

RECOUPMENT.

Set-off.

Recoupment is distinguished from set-off in these particulars:

- 1st. It arises out of matters connected with the transaction or contract on which the plaintiff's cause of action is founded.
- 2nd. It matters not whether it be liquidated or unliquidated.
- 3rd. It is not dependent on any statutory regulation, but is controlled by the principles of the common law. *Hays v. Liquor Co.*, 583.

REPEAL.

1. *Effect on pending actions. Saving clause.*

Where a statute imposing a privilege tax is repealed by another statute, without any saving clause, the effect is to obliterate the repealed statute as completely as if it had never been passed. It is considered as a law which never existed, except for suits which were commenced and concluded while the repealed law was in force. By the repeal, the right to collect the unpaid tax is taken away, whether suit is pending or not, and the suit must end. *Crow v. Cartledge*, 281.

2. *Impairing obligation of contracts.*

Taxes are not due by virtue of any contract and the repeal of a statute imposing a privilege tax is not violative of the constitutional inhibition against impairing the obligation of contracts. *Ib.*

REPLEVIN.

Possession of property by defendant. Estoppel.

An action of replevin is not maintainable where the defendant did not have possession of the property at the time of the institution of the suit, and did not execute any forthcoming bonds, nor authorize any one else to do so for him, nor ratify the act of another doing so; there can be no estoppel in such case. *Vaughn v. Huff*, 110.

SCHOOL DISTRICTS—STATUTE OF FRAUDS.

SCHOOL DISTRICTS.

Creation. Code 1906, section 4530.

Under Code 1906, section 4530, a municipality may create a separate school district without reference to any petition of the qualified electors therein, and it is not necessary, in order that a separate school district shall be established by a municipality, that it be shown that the district can maintain a school term of seven months. *Mebane v. Hickory Flat*, 592.

SEDUCTION.

Evidence. Corroboration. Criminal law. Code 1906, section 1372.

The allegations of an indictment under Code 1906, section 1372 that the woman seduced was "of previous chaste character" and that the carnal knowledge was obtained "by virtue of a false or feigned promise of marriage" cannot be maintained on the testimony of the prosecutrix alone, she must be corroborated by evidence upon these two points. *Carter v. State*, 206.

SET-OFF.

Recoupment.

Recoupment is distinguished from set-off in these particulars:

- 1st. It arises out of matters connected with the transaction or contract on which the plaintiff's cause of action is founded.
- 2nd. It matters not whether it be liquidated or unliquidated.
- 3rd. It is not dependent on any statutory regulation, but is controlled by the principles of the common law. *Hayes v. Liquor Co.*, 583.

STATUTE OF FRAUDS.

1. *Pre-nuptial contracts. Parol evidence. Identification.*

While pre-nuptial contracts are to be construed liberally in favor of the wife, this should not be so extended as to overturn the statute of frauds. *Cole v. Cole*, 335.

2. *Parol evidence.*

The rule is that if the description contained in the writing points to specific property, parol evidence is admissible to identify it because that is certain which is capable of being made certain. *Ib.*

STATUTE OF LIMITATIONS.

STATUTE OF FRAUDS—Continued.

3. *Same. Insufficient description.*

Under Code 1906, section 4775, requiring a contract in consideration of marriage or to sell lands to be in writing, a contract in consideration of marriage to convey either one of four tracts of land worth twenty-five hundred dollars each and owned by the husband without other description is void for uncertainty in description. *Cole v. Cole*, 335.

STATUTE OF LIMITATIONS.

1. *Warranty deed. New promise. Consideration. Code 1906, section 3115.*

Code 1906, § 3115, provides that the completion of the period of limitation shall defeat the right and remedy, but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon. Where a husband and wife made a warranty deed to land and six years thereafter, for the same consideration made another deed to the same party, reciting that it was given to correct a former deed, the six year statute of limitations against an action on the warranty commences to run from the date of the second deed, as the last deed is a new promise of warranty based on a former valid consideration. *Wade v. Barlow*, 33.

2. *Limitation of actions. Non-residents. Absence from the state.*

Code 1906, § 3108, providing that, if after any cause of action has accrued, the person against whom it has accrued reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action after his return, applies only where a cause of action accrues in the state and the person against whom it has accrued goes from and resides out of the state and has no application where a non-resident alien corporation claimed adverse possession of land, when such possession was by tenant against whom ejectment might at any time have been instituted. *Mortgage Co. v. Butler*, 56.

3. *Aliens. Adverse possession.*

Code 1906, § 2768 (Code 1892, § 2430), provides that a non-resident alien may have or take a lien on land to secure a debt and at any sale thereof to enforce payment of the debt may purchase the same and thereafter hold it not longer than twenty years, and during that time may sell the same in fee to a citizen and that all lands held or acquired contrary to such section shall escheat to the state, but a title to real estate in the name of a citizen of the United States, or a person who has declared his intention of becoming a

STATUTE OF LIMITATIONS.

STATUTE OF LIMITATIONS—Continued.

citizen, whether resident or non-resident, if he be a *bona fide* purchaser, shall not be forfeited by reason of alienage of any former owner or other person.

Section 3092 (Code 1892, § 2732), provides that when a mortgage after condition broken obtains actual possession or receives the profits of the mortgaged land the mortgagor or any person claiming through him may not sue to redeem after ten years from the time at which the mortgagee obtained such possession or receipt, etc. *Held* that a non-resident alien mortgagee obtaining possession through tenants, though under an invalid sale, and holding such possession and receiving the rents and profits more than ten years adversely under claim of title, secured a perfect title as against the mortgagors. *Ib.*

4. *Limitation of actions. Demand deposits. Waiver. Concealment of cause of action. Code 1906, sections 3097 and 3099. Estoppel.*

A depositor in a bank cannot sue the bank for his funds so deposited until payment has been demanded and refused and such demand and refusal is necessary to set the statute of limitations in motion. *Benefit Association v. Bank*, 610.

5. *Same.*

The demand of the depositor, however, may be waived by the bank. This may be done by the bank notifying the depositor that his claim will not be paid; and rendering him a statement of his account, showing the balance claimed by the bank to be due him is equivalent to notice that any claim for a sum in excess of that amount will not be paid and as to such excess the statute would begin to run from the time of the rendition of such statement. *Ib.*

6. *Code 1906, section 3109. Fraudulent concealment.*

Where a bank believing a forged endorsement to be genuine, paid a check to a person other than the drawer and delivered the cancelled check to the drawer as a voucher, Code 1906, section 3109, providing that "the fraudulent concealment of a right of action will postpone the running of the statute of limitations," has no application, as there was no fraud or concealment on the part of the bank, and the statute of limitations commenced running from the time the bank rendered the drawer a statement of its account showing the check charged against it. *Ib.*

7. *Same.*

In such a case, the six years' statute of limitations applies as provided by Code 1906, section 3097, and not the three years statute of

STATUTORY CONSTRUCTION—SUPREME COURT.

STATUTE OF LIMITATIONS—Continued.

limitation as provided by section 3099 of Code 1906, as the pass book, cancelled check and certificate of deposit are written evidence of the debt. *Benefit Association v Bank*, 610.

STATUTORY CONSTRUCTION.

See CONSTRUCTION OF STATUTES.

SUPERVISORS.

Stock law. Code 1906, section 2235.

Under Code 1906, section 2235, so providing the board of supervisors of a county is without powers to repeal, modify or amend an order made by it creating a stock law district until after five years have expired from the date thereof, and then only upon a like petition or vote as is required for the creation of such district. *Board of Supervisors v. Ashley*, 788.

SUPREME COURT.

1. *Construction of statutes.*

Where a statute has been reenacted after being construed by the supreme court, such construction will be adhered to by that court. *McLin & Co. v. Worden*, 547.

2. *Appeal. Motion for new trial. Recoupment. Peremptory instruction. Trial.*

The general rule is that alleged errors of the trial court; occurring during the trial, will not be revised on appeal, unless such errors have been called to the attention of the trial court in a motion for new trial. *Hayes v. Liquor Co.*, 583.

3. *Same.*

Error in giving a peremptory instruction is analogous to a demurrer to the evidence and is reviewable on appeal, although no motion for a new trial was made in the trial court. *Ib.*

4. *Recoupment. Set-off.*

Recoupment is distinguished from set-off in these particulars:

1st. It arises out of matters connected with the transaction or contract on which the plaintiff's cause of action is founded.

SUPREME COURT.

SUPREME COURT—Continued.

2nd. It matters not whether it be liquidated or unliquidated.

3rd. It is not dependent on any statutory regulation, but is controlled by the principles of the common law. *Ib.*

5. *Peremptory instructions.*

Where the evidence tends to establish a legal defense, a peremptory instruction should not be given against the defendant. *Ib.*

6. *Criminal law. Appeal. Certification of record. Code 1906, sections 84 and 85.*

Under Code 1906, sections 84 and 85, on appeal to the circuit court the copy of the record of proceedings before a police justice must be certified to by the police justice and not the city clerk. *Rodgers v. City of Hattiesburg*, 639.

7. *Circuit court. Want of jurisdiction.*

Where on appeal from a police justice court to the circuit court the record of proceedings before the police justice was not certified to by the police justice, the circuit court was without jurisdiction of the appeal, and on a further appeal to the supreme court that court was without jurisdiction of such appeal. *Ib.*

8. *Same.*

The want of such a certified copy is not a defect which can be waived or cured. It is jurisdictional and the question may be raised for the first time in the supreme court. *Ib.*

9. *Same.*

The proper order in the supreme court in such case is to reverse and remand the case with direction to the circuit court to dismiss the appeal to that court and award a writ of *procedendo* to the court of the police justice to enforce the judgment of his court unless the appellant shall perfect the record of proceeding from such police court. *Ib.*

10. *Criminal law. Appeal. Hearing. Rules of court.*

Rule 23 of the supreme court provides that "the docket of criminal cases for the whole state shall be taken up on the second Monday after the Monday fixed by law for calling the docket for each district. Under this rule where a case was not on the docket for trial when the final call of the criminal docket for the session ended, it cannot be placed there, but will be continued until the court returns to the criminal docket for another trial of same. *Bennett v. State*, 644.

TAXATION—TELEGRAPHS AND TELEPHONES.

SUPREME COURT—Continued.

11. *Same.*

This rule is not in violation of section 72, Code 1906, which provides that "the return day in the supreme court for all criminal cases no matter from what court or county or district appealed, is the Monday of any term first after the expiration of twenty days from the date of taking the appeal, "the court having the right to make rules for the efficient, orderly and systematic conduct of the business of the court. *Bennett v. State*, 644.

TAXATION.

Overvaluation. Right to relief.

Where cut-over lands were assessed for taxes as timbered lands at a valuation greatly in excess of their actual value, the board of supervisors had the right under Code 1906, § 4312, so providing to at any time reduce the assessment, because of "overvaluation known to be such." *Board of Supervisors v. Railroad*, 845.

TELEGRAPHS AND TELEPHONES.

1. *Regulations. Charges. Statutory law. Common carrier. Code 1906, sections 4826, 4899, 4842, 4843, 4844, 4839, 4841, 4845, 4883. Laws 1908, chapter 119, p. 124.*

By Code 1906, §§ 4826, 4899, a railroad commission is created for the supervision of common carriers, defining its purpose, and providing remedies for its violation, of which section 4843 includes telegraph and telephone companies as common carriers, as declared by Constitution 1890, § 195. Section 4842 gives the commission power to fix and supervise rates, section 4839 prohibits discrimination in rates, unless authorized by the commission, section 4844 forbids rebates or reductions from fixed charges, and sections 4839, 4841, 4845 and 4883, provide remedies for violations of the act. Annotated Code 1892, sections 4437, 4442, relating to combinations in restraint of trade and agreements fixing the transportation of commodities, was extended in 1900 (Laws 1900, ch. 88), section 2 of which became Code 1906, § 5002, and was re-enacted by Laws of 1908, chapter 119. Section 1, sub-section K as amended by sub-section N and O defines trusts and combines, and provides procedure and remedies for violations of the act. The defendant company was charged, in a bill filed on relation of the attorney-general, with being a trust, with discriminations in its rates, and with

TENANTS IN COMMON—TIMBER CONTRACTS.

TELEGRAPHS AND TELEPHONES—Continued.

attempting to monopolize the business of independent companies; the prayer of the bill being for an injunction and ouster, and for penalties. *Held* that the specific statutes relating to railroad commissions conferred jurisdiction upon it as to the whole matter of regulating telephone rates and provided ample remedies for violation of law to the exclusion of the general anti-trust laws. *Telephone Co. v. State*, 1.

2. *Statutes. Construction. Remedies.*

Code 1906, § 4885, in the chapter on supervision of common carriers, originally enacted in 1884, before the enactment of the anti-trust laws, provides that the remedies given by this chapter shall be cumulative to those existing by law. *Held*, that in view of Code 1906, §§ 4841, 4883, relating to procedure against common carriers, and the penalties for violation of the anti-trust law provided by Code 1906, § 5004, the section permits no election of remedies for injuries due to a discrimination in telephone rates, but the remedy is limited to that provided by the act for the supervision of common carriers. *Ib.*

3. *Charges. Statutory provisions. Remedy for discriminating charges.*

Code 1906, § 5007, being part of chapter 145, relating to trusts and combines, and providing that, in a suit by any person injured by a trust or combine, proof that such person has been compelled to pay more for services rendered by a public service corporation by reason of such combine than he would have been compelled to pay but for such agreement or combine, shall be conclusive evidence of damage and of unlawful purpose, does not indicate an intention of the legislature that the anti-trust laws should apply to discriminations in rates made by a telephone company, defined to be a "common carrier" by the laws for the supervision of common carriers. *Ib.*

TENANTS IN COMMON.

Compensation of co-tenant.

Neither joint tenant or tenants in common are entitled to compensation from each other for services rendered in the care and management of the common property in the absence of a specific agreement or mutual understanding to that effect. *Lake v. Perry*, 347.

TIMBER CONTRACTS.

See CONTRACTS.

TRIAL—VENDOR AND VENDEE.

TRIAL.

Improper argument. Instructions.

Where in the argument of a close case upon the facts, the counsel for plaintiff in commenting on the facts of defendant's failure to produce certain witnesses on the stand said, over defendant's objection, that the fact that defendant had not brought certain witnesses raised the reasonable inference that defendant believed that if such witnesses were present they would testify in favor of plaintiff, and thereupon defendant asked an instruction that the jury could not presume that any person not present would testify against defendant and that defendant was no more bound to produce such witnesses than plaintiff. *Held*, that the refusal of this instruction and the refusal of the court to prevent the improper argument of counsel was reversible error. *Railroad v. Weinstein*, 515.

UNION OF CHURCH ORGANIZATIONS.

Validity.

Where the right to property in controversy depends upon the validity of the union of two churches, the courts will not undertake to determine the validity of such union, as this is purely an ecclesiastical question, but will accept the decision, as to the validity of such union by the highest ecclesiastical authority of the church and award the property in accordance therewith. *Carothers v. Moseley*, 671.

UNITED STATES REVISED STATUTES.

§ 905. Foreign judgment. Certification. Evidence. *McLin & Co. v. Worden*, 547.

VENDOR AND VENDEE.

Acceptance of goods.

When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely receiving them, for receipt is one thing and acceptance is another. But receipt will become acceptance, if the right of rejection is not exercised within a reasonable time or if any act be done by the buyer which he would have no right to do unless he was the owner of the goods. *Drusin v. Hinds Bros. & Co.*, 304.

VESTING OF ESTATES—WAGES OF OVERSEERS.

VESTING OF ESTATES.

1. *Wills. Remainder.*

A devise of a remainder over after the death of the life tenant, to testators, brothers and sisters, being a gift to a number of persons not individually named, but all answering a general description, is a gift to them as a class. *Branton v. Buckley*, 116.

2. *Same.*

Generally in the absence of a contrary intent, the persons constituting such a class are to be ascertained at the period of distribution and the application of this rule depends upon the time when the estate vested in the members of the class. If no interest vested until the termination of the life estate, then only those members of the class in being at that time, can share in the distribution. *Ib.*

3. *Ascertainment.*

The law favors the vesting of estates at the earliest moment, and, generally, where a contrary intent does not appear, devises to a class vest, immediately upon the death of the testator in members of the class then in being, subject to open and let in members thereof, who may afterwards come into existence before the date fixed for the ascertainment of the members of the class. *Ib.*

4. *Wills. Ascertainment of members.*

Where the devise to a class vests immediately upon the death of the testator, it is attended by all the incidents of a vested estate, and consequently the shares of all members of the class in existence at that time, but dying before the period fixed for the ascertainment of the members thereof, do not lapse, but devolve upon their appropriate representation. *Ib.*

WAGES OF OVERSEERS.

1. *Lien on agricultural products. Code 1906, section 3042.*

Where an overseer is hired by the year and wrongfully discharged before the termination of his contract under Code 1906, section 342, giving a lien on crops to overseer, etc., he has a lien for his wages already earned and those he would have earned until the expiration of his contract less any earnings after his discharge. *Langford v. Leggitt*, 266.

2. *Same.*

And this is true even though at the time of the overseer's discharge he owed his employer more than the wages due at that time. *Ib.*

WAIVER.

WAIVER.

1. *Notes. Action on condition precedent. Tender.*

Where a note is given payable, without condition, on a fixed date in part payment of a right to sell a patent when obtained by the payee, and a contract is entered into at the same time between the parties to the note, which contract does not make the securing of the patent a condition precedent to the liability on the note, the payee of the note may sue on the note when due, before the patent is secured. *Byers v. McDonald*, 42.

2. *Same. Tender.*

Where in such case the maker of the note has notified the payee that he would not accept a transfer of the right to sell the patent, no tender of such transfer was necessary before suing on the note. *Ib.*

3. *Same.*

Where it is clear that a tender will not be accepted, it need not be made. *Ib.*

4. *Limitation of actions. Demand deposits. Concealment of cause of action. Code 1906, sections 3097 and 3099. Estoppel.*

A depositor in a bank cannot sue the bank for his funds so deposited until payment has been demanded and refused and such demand and refusal is necessary to set the statute of limitations in motion. *Benefit Association v. Bank*, 610.

5. *Same.*

The demand of the depositor, however, may be waived by the bank. This may be done by the bank notifying the depositor that his claim will not be paid; and rendering him a statement of his account, showing the balance claimed by the bank to be due him is equivalent to notice that any claim for a sum in excess of that amount will not be paid and as to such excess the statute would begin to run from the time of the rendition of such statement. *Ib.*

6. *Contracts of sale. Stipulations.*

Where in a contract for the sale of lumber to a buyer employed in exporting lumber, there was a provision that "shipments to the buyer should be made as steamer room for desired ports becomes available." *Held*, that this provision was for the benefit of the buyer and could be waived by him, and where so waived the seller was not excused

WARRANTY—WATERCOURSES.

WAIVER—Continued.

from delivering the lumber by showing that the buyer had not advised him that steamer room had been obtained. *Foerster & Co. v. Lumber Co.*, 762.

7. *Pleading. Replication.*

A defendant waives the failure of the plaintiff to formally deny the matter alleged in his special pleas by not moving for a judgment before the introduction of the evidence begins. *Kinney v. M. J. & K. C. R. R. Co.*, 795.

WARRANTY.

See COVENANTS OF WARRANTY.

WATERCOURSES.

1. *Change of stream. Damages.*

Where a stream has left its accustomed channel, and formed a new channel on the land of an adjoining riparian owner, the latter has the right, by the erection of barriers, to turn the waters of such stream from the new to the old channel. *Y. & M. V. R. R. Co. v. Brown*, 88.

2. *Same.*

In such case the riparian owner, on whose land the new channel is formed is not required to first clean out such old channel so as to restore it to the depth and condition it was in before the stream changed its course. *Ib.*

3. *Same.*

By condemnation of, or deed to its right of way, a railroad acquired the right to make necessary excavations to build its roadbed and if in properly constructing such roadbed, it results in a creek leaving its old channel, still the railroad had the right to turn it from its new back to its old channel. *Ib.*

4. *Constitution 1890, section 90. Acts 1906, chapter 132. Code 1906, sections 1682 and 1727. Local laws.*

Constitution 1890, section 90, prohibiting local laws in regard to watercourses, has no reference to artificial watercourses and does not invalidate acts 1906, chapter 132, nor Code 1906, sections 1682 and 1772, because counties are exempted from the provisions of the act,

WILLS.

WATERCOURSES—Continued.

as it is immaterial whether these statutes are local or general.
Haley v. Drainage Commissioners, 556.

Also see DRAINAGE DISTRICT.

WILLS.

1. *Remainder. When vested.*

A devise of a remainder over after the death of the life tenant, to testators, brothers and sisters, being a gift to a number of persons not individually named, but all answering a general description, is a gift to them as a class. *Branton v. Buckley*, 116.

2. *Same.*

Generally, in the absence of a contrary intent, the persons constituting such a class are to be ascertained at the period of distribution and the application of this rule depends upon the time when the estate vested in the members of the class. If no interest vested until the termination of the life estate, then only those members of the class in being at that time, can share in the distribution. *Ib.*

3. *Vesting of estates. Ascertainment.*

The law favors the vesting of estates at the earliest moment, and, generally, where a contrary intent does not appear, devises to a class vest, immediately upon the death of the testator in members of the class then in being, subject to open and let in members thereof, who may afterwards come into existence before the date fixed for the ascertainment of the members of the class. *Ib.*

4. *Vested estate. Ascertainment of members.*

Where the devise to a class vests immediately upon the death of the testator, it is attended by all the incidents of a vested estate, and consequently the shares of all members of the class in existence at that time, but dying before the period fixed for the ascertainment of the members thereof, do not lapse, but devolve upon their appropriate representation. *Ib.*

5. *Nuncupative will. Construction. Presumption. Instructions. Probate.*

A description in a will as "all my property" includes both real and personal property. *Caffey v. Tindall*, 851.

WITNESS.

WILLS—Continued.

6. *Probate of nuncupative will. Instructions.*

In a proceeding to probate an alleged nuncupative will which purported to devise "all" of the testator's property, it was error for the court to give an instruction to contestants that "the law presumes and in the absence of evidence to the contrary, conclusively presumes that the testator, if he was sane, knew that real estate would not pass under a nuncupative will." As the knowledge or want of knowledge on the part of the testator is a fact to be proven in the same manner that other facts are proven. *Ib.*

7. *Same.*

The law does presume, for some purposes, that all persons know the law; but not for the purpose of supplying evidence of a fact material to the controversy. *Ib.*

WITNESS.

1. *Harmless error.*

In a prosecution for embezzlement from an express company it was harmless error for the court to refuse to allow defendant on cross examination to ask the superintendent of the express company, for the purpose of affecting his credibility, if he had not made an offer to abandon the prosecution if defendant's shortage was made good where his evidence as to the material facts, was not controverted. *Hampton v. State*, 176.

2. *Criminal law. Impeachment. Contradictory statements. Instructions.*

Where a witness for the state testified that he saw the accused commit the offense charged and denied on cross-examination that he had told another that whoever said witness knew who committed the offense falsified, it was error not to allow accused to show that witness had so stated, although witness admitted saying that he did not know anything about the offense. *Gables v. State*, 217.

3. *Instructions. Credibility.*

An instruction for the state is erroneous which charges the jury that "They are the sole judges of the evidence in the case and may believe one witness and disbelieve another on the ground of relationship of the witness to the defendant, or for any other reason satisfactory to the jury. *Ib.*

WITNESS.

WITNESS—Continued.

4. *Books of account. Secondary evidence.*

In a suit upon a verified itemized account where the only question involved was one of overcharge and the items themselves as shown on the copy of the account sued on were not denied in the counter affidavit, it is still true that the question of overcharge involved the books of account and the books themselves are the best evidence and it was reversible error to allow a witness to use the itemized account to refresh his memory and testify that it was a copy of the books when it was not shown that the books themselves were correct. *Hoye v. Lumber Co.*, 229.

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